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COMPULSORY JOINDER OF PARTIES IN CIVIL ACTIONS*

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I. INTRODUCTION

THE plaintiff in a civil cause ordinarily is permitted to select the persons with whom he will litigate. The initial designation of parties to an action is made by the plaintiff, and if he chooses to sue *B* and not *A*,[1] that is ordinarily of no concern to *B* or to *A* or to the court. So also where the plaintiff without *A* as co-plaintiff sues *B*. Not always, however, is the plaintiff permitted unfettered choice in naming the parties to his lawsuit. On the one hand there are persons whose relationship to the situation in litigation is outside the range of permissible joinder, either as co-defendants or as co-plaintiffs. No court, for example, will permit a plaintiff to sue defendant *B* on one claim and, in the same suit, defendant *C* on a wholly unrelated and dissimilar claim. Nor will it permit two unrelated plaintiffs to sue a single defendant in one action where the liabilities alleged have utterly no factual relationship to each other. On the other hand, there are those persons whose presence before the court is "required," even though the original plaintiff would prefer them not there. In these realms of improper and required joinder of parties, the initial plaintiff is not the master of his case.[2]

Setting the boundaries of these realms is impossible. Modernly there has been a relaxation of rules with respect to permissible

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1 Throughout, "*A*" will be employed to designate the absent person whose nonjoinder is causing concern.

2 He may lose "mastery" also through intervention, a third-party complaint, and the like. But these enlargements of the scope of an action are bottomed on considerations somewhat different from those here studied and will be referred to only collaterally.

joinder until in many jurisdictions it is quite possible to accomplish a joinder of parties which even complicates, rather than simplifies, the conduct of the particular litigation. As to required joinder of parties, however, there is discernible no trend, no current change. Century-old principles are today applied to the determination of whether a given suit can proceed in the absence of *A*, with a dismaying diversity of results in factually similar cases. It is past time for a critical evaluation of these principles and the cases decided in purported accordance with them.[3]

At first the problem may seem one of semantics only. The party called by one court "indispensable" is by another called "necessary." Whom one writer has labeled "insistible" another has termed "conditionally necessary," another "necessary," and another "substantial."[4] Another terminology is "active" and "passive" parties.[5] A clearer, standardized terminology carefully applied might solve the problem—so it is said.[6] The point has merit, but it is overstated. Carefully chosen terminology accurately used is always beneficial, but the trouble lies far deeper, as the New York experience clearly indicates.[7] It is not simply that labels have

[3] It may be helpful to note in passing that there is a tendency to confuse problems of joinder of parties with problems of joinder of causes of action or claims. This confusion of thought, however, obtains principally in connection with questions of permissible joinder, not compulsory joinder. Apparently there is no such thing as compulsory joinder of distinct causes of action. See Blume, "Required Joinder of Claims," 45 MICH. L. REV. 797 (1947). If two claims are verily separate, there is never a requirement of combining the two "causes" in one suit. In one circumstance, however, the result is much the same as if there were compulsory joinder of causes of action. It is where the court is faced with a choice of determinations as to whether the demands made upon defendant by plaintiff constitute one or several causes of action. If the court holds the cause to be single, plaintiff must prosecute all the demands in one action on penalty of having "split" the claim, with resulting loss of the portion not included in the first action. In indistinguishable circumstances another court may label plaintiff's claims separate causes, and, because there is no compulsory joinder of causes of action, plaintiff may elect to sue serially. Compare Reilly v. Sicilian Asphalt Paving Co., 170 N.Y. 40, 62 N.E. 772 (1902), with Fields v. Philadelphia Rapid Transit Co., 273 Pa. 282, 117 A. 59 (1922). Thus, the power to interpret "cause of action" is, in some degree, the power to compel a joinder of claims. But there seems little likelihood of mistaking any of these problems for questions of compulsory parties joinder.

[4] Confusion in this terminology is not limited to characterization of *parties*. In Gillis v. Gillis, 96 Ga. 1 at 15, 23 S.E. 107 (1895), the court said that in an action to probate a will subscribing *witnesses* are, "all of them, unless accounted for, indispensably necessary witnesses"!

[5] This unfamiliar usage is employed occasionally in Pennsylvania. See Coleman's Appeal, 75 Pa. 441 at 459 (1874); Cramer v. Refowich, 40 Schuyl. Leg. Rec. 55 at 57 (Com. Pl. 1944). Its source seems to be Joy v. Wirtz, (C.C. Pa. 1806) 1 Wash. C.C. 517 at 518, 13 Fed. Cas. 1172, No. 7,554.

[6] See note, 56 YALE L.J. 1088 (1947), implying that the basic problem has been one of lack of uniformity of nomenclature. See also 12 N.Y. JUD. COUNCIL REP. 178 (1946).

[7] From 1851 until 1946 the pertinent New York statute read, with insignificant variations: "The court may determine the controversy as between the parties before it

determined the outcome of many cases. The trouble rather is the result of several factors operating concurrently: a ready reliance on labels for solutions of particular cases, a thoughtless reiteration—instead of a critical reexamination—of the basic principles of required joinder, and a conceptualistic view of "jurisdiction" and "rights" in relation to the joinder of parties.

where it can do so without prejudice to the rights of others or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties the court must direct them to be brought in." Decisions thereunder were fairly orthodox, but the labels attached to the absent persons lacked uniformity. For example, persons whose joinder was required even without liminal objection to the nonjoinder and, sometimes, despite their unavailability were called, variously, "indispensable," "necessary and indispensable," "necessary as well as proper," and "necessary." *Indispensable:* Druckerman v. Harbord, 174 Misc. 1077, 22 N.Y.S. (2d) 595 (1940); Powell v. Finch, 12 Super. Ct. (5 Duer) 666 (1856). *Necessary and indispensable:* First Nat. Bank v. Shuler, 153 N.Y. 163, 47 N.E. 262 (1897); Mannaberg v. Culbertson, 35 N.Y.S. (2d) 642 (1942), revd. on other grounds, 266 App. Div. 765, 41 N.Y.S. (2d) 951 (1943); Bayer v. Bayer, 215 App. Div. 454, 214 N.Y.S. 322 (1926); Shaver v. Brainard, 29 Barb. (N.Y.) 25 (1859). *Necessary and proper:* McNight v. Bank of N.Y. & Trust Co., 254 N.Y. 417, 173 N.E. 568 (1930); Matter of Luckenbach, 181 Misc. 265, 42 N.Y.S. (2d) 487 (1943). *Necessary:* Steinbach v. Prudential Ins. Co., 172 N.Y. 471, 65 N.E. 281 (1902); Galusha v. Galusha, 138 N.Y. 272, 33 N.E. 1062 (1893); Mahr v. Norwich Union Fire Ins. Soc., 127 N.Y. 452, 28 N.E. 391 (1891); Osterhoudt v. Board of Supervisors, 98 N.Y. 239 (1885). On occasion the term "necessary" was applied also to those whose nonjoinder was waived if not made the point of prompt objection, as was the phrase "proper, if not necessary." Sisson v. Hassett, 155 Misc. 667, 280 N.Y.S. 148 (1935); Thompson v. New York Elevated R.R., 16 App. Div. 449, 45 N.Y.S. 64 (1897). See Osterhoudt v. Board of Supervisors, 98 N.Y. 239 at 244 (1885). Most often, however, the New York courts did not bother to classify or characterize those absent, whether holding that they had to be joined or, under the circumstances, were excused. *Presence required:* Gugel v. Hiscox, 216 N.Y. 145, 110 N.E. 499 (1915); Natter v. Blanchard Co., 153 App. Div. 814, 138 N.Y.S. 969 (1912); Porter v. Baldwin, 139 App. Div. 278, 123 N.Y.S. 1043 (1910); Fisher Textile Co. v. Perkins, 100 App. Div. 19, 90 N.Y.S. 993 (1904); Mayer v. Frankfeld, 85 Hun (N.Y.) 214, 32 N.Y.S. 1007 (1895); Norman v. General American Trans. Corp., 181 Misc. 233, 47 N.Y.S. (2d) 390 (1943). *Joinder excused or waived:* Keene v. Chambers, 271 N.Y. 326, 3 N.E. (2d) 443 (1936); Silberfeld v. Swiss Bank Corp., 266 App. Div. 756, 41 N.Y.S. (2d) 470 (1943); Porter v. Lane Constr. Corp., 212 App. Div. 528, 209 N.Y.S. 54 (1925); Hagenaers v. Caballero, 195 App. Div. 580, 187 N.Y.S. 179 (1921); Dickinson v. Tysen, 125 App. Div. 735, 110 N.Y.S. 269 (1908); Mittendorf v. New York & Harlem R.R., 58 App. Div. 260, 68 N.Y.S. 1094 (1901); Brown v. Birdsall, 29 Barb. (N.Y.) 549 (1859). In some of the decisions in the former category (sustaining an objection to nonjoinder) joinder apparently was quite feasible and the objection timely, with little or no indication of how the ruling would have gone had these facts been otherwise. See Natter v. Blanchard Co., Porter v. Baldwin, Fisher Textile Co. v. Perkins, Mayer v. Frankfeld, and Norman v. General American Trans. Corp., all supra.

The New York Judicial Council, proposing a remedial statute in 1946, complained about the "shifting and overlapping terminology" and—apparently as bad or worse—the failure to classify absent parties except to use the unrevealing phrase "defect of parties." 12 N.Y. JUD. COUNCIL REP. 178 (1946). On the Council's recommendation, §193 of the Civil Practice Act was amended in 1946 to read, in part: "A person whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court is an indispenable party. A person who is not an indispensable party, but who ought to be a party if complete relief is to be accorded between those already parties is a conditionally necessary party." The results under the new statute are not noticeably better. First, the courts must wrestle with the facts of individual cases as before; the new

Why should a plaintiff ever be compelled to litigate with or against parties not of his own choosing? Not for his own benefit. It may be true that if he is permitted to proceed despite a missing defendant he may be precluded from a second suit against the absent party. But there seems no reason why effort should be expended to require him to join a party for any benefit which may accrue to him, except as we may value his interest in the orderly functioning of the courts. Indeed, he will vigorously oppose being given any such consideration, saying, in effect, "Don't worry about me!" There are three classes of interests which may be served by requiring the presence of additional parties in an action: (1) the interests of the present defendant; (2) the interests of potential but absent plaintiffs and defendants; (3) the social interest in the orderly, expeditious administration of justice. Probably no catalog of cases upon the basis of such a classification can be made because few cases are explicit in this regard and many represent an indistinguishable mixture of two or all three of these interests. Nevertheless, clear thinking will be materially aided if it is remembered that the real problem in any compulsory joinder case is whether the initial choice of parties by the plaintiff is to be overborne by some combination of these three countervailing interests—not by a blind adherence to an elderly formula.

II. General Principles of Compulsory Joinder

A. *The Traditional Formulation*

Like most procedural practices, the present rules of compulsory joinder represent an evolutionary development from the rules of an earlier day. In pre-code times, there were at least verbal distinctions between the rules applicable to lawsuits and those which controlled actions in equity, and these were the more marked in the case of joinder of defendants than joinder of plaintiffs. At law, the practice was to consider a single disputed issue, and thus was required the presence of only the persons "directly and im-

terminology is no shortcut to good results. See, e.g., Swinton v. W. J. Bush & Co., 199 Misc. 321, 102 N.Y.S. (2d) 994 (1951); Rabinowitz v. Kaiser-Frazer Corp., 111 N.Y.S. (2d) 539 (1952). Second, although confusion in terminology may be rare, it is not extinct. See 418 Trading Corp. v. Moon Realty Corp., 285 App. Div. 444, 137 N.Y.S. (2d) 513 (1955) ("indispensable and proper"). Third, despite the Judicial Council's plaint, courts still fail to classify the absent person by *any* terminology, much less the statutory one. See Sirgrom Properties, Inc. v. Air King Products, Inc., 277 App. Div. 997, 100 N.Y.S. (2d) 20 (1950); Malcolm E. Smith, Inc. v. Zabriskie, 84 N.Y.S. (2d) 362 (1948). Cf. Witenberg v. Banca Commerciale Italiana, 273 App. Div. 888, 78 N.Y.S. (2d) 593 (1948); Howard v. Arthur Murray, Inc., 281 App. Div. 806, 118 N.Y.S. (2d) 677 (1953).

mediately interested in the subject-matter of the suit, and whose interests are of a strictly legal nature."[8] The presence of persons possessing mere equitable or "similarly remote" interests was not only not required but was not even permitted. Naturally, only those present were bound by the court's decision. In equity, on the other hand, a decree was sought, and not a decision merely.[9] Accordingly, it was necessary to bring before the court all persons whose interests might be affected by the proposed decree, or whose concurrence was necessary to an effective and meaningful determination of the controversy. Each person having a legal or equitable interest in the subject matter of the suit was required to be a party to the action—plaintiff or defendant as the case might be, or, if unwilling, then defendant in any event.

When the nineteenth century merger of law and equity was attempted, pleading rules for civil actions took on an equity complexion, and compulsory joinder of parties was no exception. Usually it is stated that the codes adopted the old equity principles to control all questions of parties.[10] In fact, however, the change effected was less marked than the foregoing statement would lead one to believe, for in substantial measure application of the equity rules to actions that would have been brought in law courts prior to the unified practice produces results little different from those in the common law courts. And, of course, the modern equity cases are treated much as of old. Such differences (between the rules in law and equity) as were said to exist in an earlier day and are said to continue in modern practice are due more to distinctions in the nature of the remedies sought and facts dealt with than to any supposed distinctions in fundamental notions of res judicata, affording disputants a day in court, minimizing litigation, and the like.

Nearly all decisions dealing with required joinder of parties give obeisance to a few early judicial pronouncements, which in turn are based on two simple principles of equitable origin. "One of them is a principle admitted in all Courts of Justice in this country, upon questions affecting liberty, or life, or property; namely, that no proceedings shall take place with respect to the rights of any one except in his presence."[11] The second principle

[8] STORY, EQUITY PLEADINGS, 10th ed., 77 (1892).

[9] HAWES, PARTIES TO ACTIONS 48 (1884).

[10] See, e.g., Bank of California v. Superior Court, 16 Cal. (2d) 516, 106 P. (2d) 879 (1940); Sando v. Roberts, 36 S.D. 556, 156 N.W. 64 (1916); CLARK, CODE PLEADING, 2d ed., 348 et seq. (1947); 12 N.Y. JUD. COUNCIL Rep. 174-175 (1946).

[11] CALVERT, PARTIES TO SUITS IN EQUITY, 2d ed., 2 (1847).

is this "that when a decision is made, it shall provide for all the rights, which different persons have in the matters decided. For a 'Court of Equity, in all cases, delights to do complete justice, and not by halves'; to put an end to litigation, and to give decrees of such a nature, that the performance of them may be perfectly safe to all who obey them: interest reipublicae, ut sit finis litium."[12] The two principles have been stated in many forms, but always it seems possible to reduce the statement to the two fundamental ideas: that a court cannot adjudge the rights of an absent person, and that a court should avoid inconclusive determinations.

If the matter is in truth so simple, what is responsible for results which are often unpredictable, occasionally inconsistent, and sometimes unjust? How adequate and how sound the two (?) principles are, how effectively they have been embodied in tests, how successfully the tests have been applied to specific problems—these are the matters to be examined.

Little quarrel may be had with the idea that a court is without power to adjudicate the right of an absent person. But the idea has sometimes been transposed into the concept that a court is without "jurisdiction" to proceed to a determination of the litigation before it without the presence of the absent one. Appropriately applied in a few circumstances, the jurisdictional argument is not even remotely applicable in many situations where it is relied on as dispositive of the matter.

Where a plaintiff comes into court, asks relief against *A* but says that he cannot find *A* or any of his property, the complaint will be dismissed, and there will be no discussion of indispensable parties. If plaintiff seeks judgment against *A* and *B* without the presence of *A*, no judgment against *A* will be rendered.[13] All notions of due process are set to resist any adjudication determining *A*'s interests unless he is actually or constructively before the tribunal making the determination. It is but a short step to the statement that a court is without "jurisdiction" (i.e., power) to make a determination of *A*'s right. It is accurate to say that as to *A* the action is jurisdictionally defective.

But what about *B*, who *is* present as a defendant? Plaintiff is not seeking relief against *A*, but against *B*. Is the action jurisdictionally defective as to *B*? Courts sometimes suggest that it is, and

[12] Id. at 2-3. "It is in the interest of the commonweal that there be an end to litigation."

[13] Clement Martin, Inc. v. Dick Corp., (W.D. Pa. 1951) 97 F. Supp. 961.

there, precisely, lies a major difficulty.[14] To the extent that a court's decision affects the parties who are present there is no jurisdictional defect.[15] And as to the parties who are absent, plaintiff of course will not seek relief against them; any such request would be summarily denied. If the court cannot dispose of the claim against *B* without ruling on the rights of *A* at the same time, the court ordinarily ought not to go on but should dismiss. Indeed, if it does go on, the adjudication is void as to *A*, being truly defective in the jurisdictional sense; the court is powerless to bind a person by its judgment in a case in which he is not a party or appropriately represented.[16] It must ever be remembered, however, that the jurisdictional defect relates to *A* and not to *B*, and that refusal to proceed to a consideration of the claim against *B* is only ancillary or consequential to the problem as to *A*. There is no jurisdictional reason whatever for refusing to render judgment as to *B*.

The point is important enough to justify restatement in slightly different terms. It has been suggested that there is an evident inconsistency in the jurisdictional argument.[17] The argument seems to run like this: *A* cannot be bound by a court's judgment if he is not properly before the court; *A* is not before the court; *A* would be bound by the court's judgment in this case; therefore, no judgment can be rendered. Plainly, there are two inconsistent assertions in the series. If *A cannot* be bound by a court's judgment in his absence, he *will not* be bound by the court's judgment in this case. *B* is before the court. If plaintiff seeks relief against *B*, disclaiming any interest in a judgment against *A*, there is no jurisdictional reason whatever for refusing to render a judgment against *B*. For reasons of equity or convenience the court perhaps *ought* not to proceed to a determination until the absent person is brought in, but that is quite different from saying that the court

[14] See, e.g., 418 Trading Corp. v. Moon Realty Corp., 285 App. Div. 444, 137 N.Y.S. (2d) 513 (1955); Norman v. General American Trans. Corp., 181 Misc. 233, 47 N.Y.S. (2d) 390 (1943); 12 N.Y. JUD. COUNCIL REP. 176 (1946).

[15] See Dyer v. Stauffer, (6th Cir. 1927) 19 F. (2d) 922: "It is often said that a court of equity has no jurisdiction of a creditor's bill, . . . if an indispensable party is not on the record. This is not an accurate use of the term. If the relief sought is of an equitable character, and the parties against whom it is sought are in court, it is clear that a court of equity has jurisdiction. Upon objection duly made, sometimes without objection, it should decline to proceed without necessary parties . . . ; but, if it does proceed, its action is erroneous, not void."

[16] But cf. Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U.S. 459 at 473 (1926).

[17] HAYS, TEACHERS' MANUAL FOR CASES AND MATERIALS ON CIVIL PROCEDURE 16 (1948).

is without jurisdiction to proceed against *B*, who is present. Although the two tests may lead to the same conclusion, they may not—and where they do not, the jurisdictional test seems erroneous.

The second of the two traditional principles—that a court should avoid inconclusive determinations—has proved less troublesome than the first because of its greater flexibility. It is one facet of a wise public policy designed to minimize litigation and to keep the courts as free as feasible from congestion. Repetitive litigation is traditionally abhorrent to courts of equity, from whose compulsory joinder formulations the current rules claim descent. The public interest in a smoothly functioning judiciary overbears the individual's desire to impose on the court's time to secure a moot decision or to have two determinations where one would suffice. As applied here, the idea is that a court ought not to concern itself with the controversy between the parties in court if *A*, who is absent, is so intimately related to the controversy that further litigation will be required to establish his position.

It will be observed, however, that there are only two interests to be served in avoiding repetitious litigation: the public interest in conservation and economical utilization of judicial energies, and the interest of defendants in avoiding double harassment. As for the latter interest, it is not involved in suits where the absent person is a potential co-defendant, and no rule of compulsory joinder is necessary to prevent double harassment here. The defendant in court does not complain that he will be sued twice if this case goes to judgment without *A* as co-defendant; instead, he seeks simply to obtain for himself an advantage from plaintiff's failure to sue *A*.[18] Nor, apparently, can *A* be harmed by his omission from the first action; indeed, it is possible that if plaintiff is unsuccessful in that action, he will be bound thereby in a subsequent suit against *A*.[19] If plaintiff wins the first suit, *A*, not yet having had his day in court, will still have an opportunity to defend on the merits.[20] If the absent person is a potential co-plaintiff, the possibility of double harassment often is of little concern in the first suit; the

[18] "The defendants understandably support the result reached by the District Court in holding that the action could not go on without personal jurisdiction over the directors. If that holding results in the complaining shareholder being unable to bring his suit either in any federal court or . . . any state court the result may disappoint the plaintiff, but the defendants will bear up under it pretty well." Goodrich, J., in Kroese v. General Castings Corp., (3d Cir. 1950) 179 F. (2d) 760 at 762-763.

[19] See Bernhard v. Bank of America Nat. Trust & Sav. Assn., 19 Cal. (2d) 807, 122 P. (2d) 892 (1942).

[20] Id. at 813.

court before whom the subsequent suit is brought is adequately equipped to handle the situation in response to defendant's plea of res judicata. If res judicata will not provide the solution and it is clear even during the first suit that a legitimate claim yet may be asserted by *A* in a second suit, the court obviously must take this possibility into account in determining its course in this first action. Even here, however, in the face of a predictable, unbarred suit by *A*, the court may elect to proceed.[21]

But the other interest in avoiding a multiplicity of suits—the public interest in the conservation of judicial energies—is involved in every such case. The courts should be kept free to handle meritorious litigation. There is plain economic waste in duplicate litigation.[22] If it can be made to appear to a court that a controversy presented to it will not be completely settled in *A*'s absence, the court is clearly justified in inquiring whether it ought to require *A*'s presence, or, lacking it, to dismiss the case. It will be observed immediately, however, that by nature minimizing litigation and conserving courts' energies are relative values to be weighed with other values in the scale of justice. "Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems."[23] The equitable policy of doing justice "entire and not by halves" can be made to yield to countervailing factors which are more pressing. The mere fact that a second action may be required to determine the totality of issues involved in a controversy is not a bar to the maintenance of the incomplete first action. This the courts have long recognized by reference to what they have called necessary (or conditionally necessary) parties. They do not, in this realm, speak of jurisdictional barriers to action. So long as the courts do not abdicate the function of weighing this value, which tends to deny an adjudication, against those which indicate the need for an adjudication, there can be little objection to a consideration of compulsory joinder matters with considerable regard for this second principle. It represents a wise and useful policy, but it is not a rigid, unyielding barrier beyond which a court is powerless to proceed.

[21] Choctaw and Chickasaw Nations v. Seitz, (10th Cir. 1951) 193 F. (2d) 456.

[22] Exhortations to avoid such economic waste appear in Crosley Corp. v. Hazeltine Corp., (3d Cir. 1941) 122 F. (2d) 925 at 930, and Helene Curtis Industries v. Sales Affiliates, (S.D. N.Y. 1952) 105 F. Supp. 886 at 901.

[23] Frankfurter, J., in Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180 at 183 (1952).

B. *A Proposed Formulation*

If there is some validity in these criticisms and comments, it should be possible to suggest another and superior formulation of the guiding principles in required joinder cases.

In the first place, despite the fallacy in the old jurisdictional argument that the court must not proceed because the result will be an (impossible) adjudication upon the rights of *A* (the absent person), there is nevertheless a very proper reluctance to make a determination which may affect adversely the interests of *A*. The distinction is between affecting *A*'s rights *legally* and affecting them *factually*. Since the court is without power to adjudicate the rights of *A*, it is clear that the court's determination of the controversy between the parties who *are* present will not and cannot legally affect *A*'s rights. But the decision may, *in fact*, affect *A*'s interests,[24] as where he is left with a claim against one of the parties in the first action which, although technically unimpaired, is practically and factually worthless; and it is small comfort to him to be informed that his claim is legally intact. So, although the old jurisdictional bugbear be done away with, courts unquestionably must seek to avoid determinations which will adversely affect absent parties. This is fundamentally and materially different from the rigid jurisdictional argument. It is a statement of policy, not unrelated to considerations of due process,[25] in the light of which the court may seek to do maximum justice in any given situation. Although it indicates that the prospect of an adverse effect upon the missing party is a ground for refusing to proceed in his absence, it does not deny that there may, nevertheless, be an opposing and perhaps off-setting consideration which presents appealing arguments in favor of going ahead with the case. This leads to the other principle here suggested as an improvement over current formulations.

This other principle arises out of the fact that although it is important to determine a controversy in one package where possible (and all thinking here must be conditioned by the need and desire to conserve judicial resources), in some cases plaintiff will not be able to assert his claim at all if not permitted to do so in the

[24] See Sun Oil Co. v. Humble Oil & Ref. Co., (S.D. Tex. 1950) 88 F. Supp. 658 at 663: "While it would not be *bound* by the judgment if it were not a party, it is apparent that it will be *affected* by whatever is done here." See also Eagleton, "Proposed 'Parties' and 'Joinder' Sections for Federal Pleading Rules," 3 UNIV. CHI. L. REV. 597 at 614-615 (1936).

[25] Calcote v. Texas Pac. Coal & Oil Co., (5th Cir. 1946) 157 F. (2d) 216 at 224.

absence of some "interested" parties.[26] The existence of this situation is a factor which should prompt the court to proceed to a hearing and determination of the case if it possibly can do so.[27] Courts exist for the determination of disputes among the people; in a particular litigation there is an obligation on the court to make a meaningful determination if at all possible. Because the law grants almost no choice between the use of courts of law and forcible rectification of wrongs done, it seems to follow that the sovereign is under a correlative obligation to provide a reasonably effective mechanism for dispute settling, not only in general but in particular cases.[28] The fact that unavoidably there may be required two or more actions to dispose of a dispute should not preclude the court from considering the case, despite the inclination to avoid repetitive litigation.[29] If only through multiple suits can justice be done, there is nothing inherent in our judicial system forbidding those several suits. Minimization of litigation is not an end in itself, and it has its price.

It may be suggested that the plaintiff's inability to bring all his parties to court at one time, and a consequent inability to assert his claim at all, does not shock one's sensibilities because such a plaintiff is in no worse position than the plaintiff who seeks relief against *A* only and who cannot, for any of various reasons, hale *A* into court. However, it is not hard to perceive a substantial dif-

26 Shields v. Barrow, 17 How. (58 U.S.) 130 (1854), is the most celebrated illustration. It is discussed, with similar cases, at length in the next succeeding section.

27 "While it is true that any judgment rendered will not be *res judicata* as to the State and theoretically, at least, there will be the possibility of further litigation to determine the State's rights, such a prospect appears unlikely and would in any event be less undesirable than to leave the plaintiffs without a remedy." Black River Reg. Dist. v. Adirondack League Club, 282 App. Div. 161 at 172, 121 N.Y.S. (2d) 893 (1953). ". . . [A] plaintiff whose bill sets forth a cause of action . . . should, if possible, be given an opportunity to prove [it]. . . ." Bourdieu v. Pacific Western Oil Co., 299 U.S. 65 at 71 (1936).

28 "It is the duty of the court . . . to proceed with the case as far as it can." Conroy v. Cover, 80 Colo. 434 at 441, 252 P. 883 (1927). A court will "strain hard" to make an adjudication. Calcote v. Texas Pac. Coal & Oil Co., (5th Cir. 1946) 157 F. (2d) 216 at 224; Zwack v. Kraus Bros. & Co., (S.D. N.Y. 1950) 93 F. Supp. 963; New England Mutual Life Ins. Co. v. Brandenburg, (S.D. N.Y. 1948) 8 F.R.D. 151 at 154. In Bourdieu v. Pacific Western Oil Co., 299 U.S. 65 at 71 (1936), the Supreme Court referred to "the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in." In Swinton v. W. J. Bush & Co., 199 Misc. 321 at 324, 102 N.Y.S. (2d) 994 (1951), Justice Walter noted that there is a "degree to which courts properly may sacrifice logic and the symmetry of legal concepts to the practical desirability of affording a forum to a suitor instead of depriving him of a hearing because of inability to reach with process in one jurisdiction all those whom logic and symmetry say should be reached."

29 Wesson v. Crain, (8th Cir. 1948) 165 F. (2d) 6; Choctaw and Chickasaw Nations v. Seitz, (10th Cir. 1951) 193 F. (2d) 456.

ference between the two situations. The argument is cousin to the fallacious jurisdiction argument discussed earlier. In the case involving only *A*, plainly there is no jurisdiction over him and rendering a decision against him would do violence to concepts of due process. Admittedly plaintiff is unable to assert his (possibly meritorious) claim, but only because a reasonable, fundamental, and unavoidable barrier is erected before him. All this is clearly distinguishable from the situation wherein plaintiff succeeds in bringing before the court some of the persons concerned, but is unable to obtain service upon *A*. If plaintiff is willing to forego his claim against *A*, at least temporarily, what reason is there for withholding adjustment of claims among the parties present? The absolute barrier in the case involving *A* alone is lacking here, and it is a blind justice which can see in this instance no method of (and no reason for) granting plaintiff as against defendants in court whatever relief he seems entitled to. If the decree[30] can be shaped to give the plaintiff at least some of the relief he desires while protecting *A*'s interests, the court ought to proceed with the case.[31]

In short, a court may be faced with the necessity of striking a balance between two appealing but competing policies. On the one hand is the policy of seeking to *avoid an adverse factual effect on the interests of absent persons;* on the other is the policy of seeking to *give a petitioner as much merited relief as possible.*[32]

Where traditionally the emphasis is on the court's lack of power to adjudge the rights of *A* (the absent one), the new statement assumes the lack of power and goes on to the more important consideration of the factual effect on *A* of the court's judgment between plaintiff and defendant. It implies, also, that there may be devices available short of an outright judgment for plaintiff or

[30] The use here of the equity term "decree" reflects the fact that it is in equity cases that a court finds most frequently the opportunity to shape its judgment to fit particular and peculiar circumstances.

[31] See, e.g., Kroese v. General Steel Castings Corp., (3d Cir. 1950) 179 F. (2d) 760, cert. den. 339 U.S. 983 (1950); Gauss v. Kirk, (D.C. Cir. 1952) 198 F. (2d) 83; Empire Ordnance Corp. v. United States, (Ct. Cl. 1952) 108 F. Supp. 622 (suggesting intervention if *A* will be aggrieved); Swinton v. W. J. Bush & Co., 199 Misc. 321, 102 N.Y.S. (2d) 994 (1951), affd. 278 App. Div. 754, 103 N.Y.S. (2d) 1019 (1951).

[32] Cf. MOORE, FEDERAL PRACTICE, 2d ed., 2154-2155 (1948). On occasion the second principle is stated as, simply, a qualification on the rule that a court should not proceed if an absent person will be "affected" or if defendant may be subjected to double liability or harassment. See, e.g., Zwack v. Kraus Bros. & Co., (S.D. N.Y. 1950) 93 F. Supp. 963 at 965. Yet this (incidental) qualification seems to embody one of the two competing interests which ultimately control the disposition of these questions.

defendant which will not materially harm *A* and yet provide a useful determination.

As to the second principle, instead of emphasizing a court's desire to do justice entire rather than by halves—both to avoid double vexation and to conserve judicial resources—the proposed statement calls attention to an obligation on the court to try to devise a way to proceed in the excusable absence of *A* if, otherwise, plaintiff will be unable to obtain a judicial determination of the controversy between himself and defendant. This does not abandon the historic, almost axiomatic concern for minimizing the quantity of litigation. But emphasis on reducing the number of adjudications is not needed in cases troubled by questions of required joinder. The need rather is for recognition of the possible inability of the plaintiff to proceed at all, anywhere, if foreclosed here.

Neither of the two principles suggested is an unyielding rule, and each requires of the court a conscientious inquiry into the circumstances of the claim itself. It is this laboring, this reasoning, with principles (more accurately, interests) that would represent the significant change from the usual pattern of decision in required joinder cases. The mechanical application of rules that have become almost cliches is more likely to miscarry than a thoughtful balancing of legitimate, competing interests.

There follow discussions of cases in four different types of groupings. Taken together, they may sufficiently present the principal problems encountered to provide a fair test of the utility of this kind of analysis.

First is a discussion of a few notable cases in which in personam equitable relief was sought. Principal among these is historic *Shields v. Barrow*,[33] evidence that a test well stated may be ill applied. Because of equity's traditional flexibility, this is the best context in which to discuss the possibility of shaping the court's decree to give the plaintiff as much merited relief as possible and yet to protect the interests of absent persons.

Second is a discussion of cases, mostly at law, whose common feature is that they involve contractual obligations jointly owed or jointly owned. Here considered is whether the terms "joint" and "several" have substantive content or serve merely to describe procedural results. These cases illustrate the difficulty in applying a pair of generalized principles to the solution of problems usually

[33] 17 How. (58 U.S.) 130 (1854).

answered by the mechanical application of simple and familiar labels.

Third is a discussion of cases involving interests in real property. This is an area in which nearly always it is possible to obtain jurisdiction over all interested in the real estate. Hence the plaintiff's "right" to a determination will not be destroyed by judicial insistence that he join other persons who may be thought to have claim to the land, and joinder normally will be ordered. Joinder is desirable. It is possible. Is it therefore imperative?

Fourth is a discussion of cases lodged in the federal courts by virtue of diversity of citizenship of the parties. Diversity jurisdiction cuts across nearly all the cases that could be considered, but the effect of a diversity-destroying joinder and the correlative shortcomings of state court process illustrate in striking fashion the plight of the plaintiff who may be left without any forum whatever. The question to be answered is whether this possibility affords a ground for relaxation of the compulsory joinder rules.

III. COMPULSORY JOINDER PRINCIPLES IN ACTION

A. *In Shields v. Barrow, and Other In Personam Relief Cases (Formulas Are Not Foolproof)*

A good place to begin a discussion of the application of these principles is with the 1854 decision of the United States Supreme Court in *Shields v. Barrow*[34] and the problems it suggests. *Shields v. Barrow* is the most influential, though not the first, of Supreme Court decisions on the subject of required joinder of parties. Its brief catalog of parties in equity actions has been generally accepted in subsequent federal cases[35] and is based on principles applicable in state courts as well.[36] Also, the compulsory joinder provisions of the Federal Rules of Civil Procedure,[37] applicable to law and

[34] Ibid.

[35] It has been cited by name on this subject in the text of more than three hundred decisions, frequently with direct quotation.

[36] See Stern v. Maguire, (S.D. N.Y. 1938) 23 F. Supp. 827 at 828. Occasionally the Shields v. Barrow language is used verbatim, not always with credit. See, e.g., Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501 at 514, 39 S. 392 (1905) (credit given); Woulfe v. Atlantic City Steel Pier Co., 129 N.J. Eq. 510 at 516, 20 A. (2d) 45 (1941) (no credit given); Goldberg v. Davis Mfg. Co., 56 Dauph. 358 at 361 (Pa. Com. Pl. 1945) (no credit given). See comment, 29 CALIF. L. REV. 731 at 735 (1941).

[37] Rules 19 and 12(b) and (h).

equity alike,[38] stem more or less directly from the *Shields v. Barrow* formulation.[39] What were the facts of this remarkable case?

Barrow sold a plantation to Shields, a Louisiana citizen, for $227,000, payable in installments. The balance was evidenced by a negotiable note signed by Shields, and endorsed by six individuals—two Mississippians and four Louisianans.[40] After $107,000 had been paid there was default, and Barrow obtained a judgment against Shields. Attachment was run against Shields and Bisland, who was the most responsible of the endorsers. In this state of affairs, a compromise agreement was entered into by Barrow, Shields, and the six endorsers. By its terms Barrow, the vendor, was to regain the plantation and retain the $107,000, and the endorsers were to execute notes, payable to Barrow, aggregating $32,000. Barrow then was to release Shields and to dismiss the attachment suit pending against him and Bisland.

Becoming dissatisfied with this arrangement,[41] Barrow, a citizen of Louisiana, instituted the present action to set aside the compromise agreement as having been obtained improperly.[42] He filed his bill in the federal circuit court for the eastern district of

38 Gauss v. Kirk, (D.C. Cir. 1952) 198 F. (2d) 83 at 85, n.2. Cf. N.Y.C.P.A. §193 (3); 12 N.Y. JUD. COUNCIL REP. 183-185 (1946).

39 The derivation is traced in 3 OHLINGER, FEDERAL PRACTICE, rev. ed., 353-355, 358 (1948).

40 In argument counsel for plaintiff-appellee mentioned that there were three Mississippi citizens. 17 How. (58 U.S.) 130 at 135. The opponents' argument, however, asserted that there were but two (id. at 131), and the Court seems to have agreed (id. at 139).

41 One can only speculate as to why Barrow was dissatisfied with the compromise agreement, but the reason for the "hard" bargain which he drove in the agreement is plain when viewed in historical context. The plantation was sold in 1836. The compromise was effected in November of 1842, and the instant suit was begun in December of 1842. Between the first date and the last two, the worldwide Panic of 1837 had depressed prices and disorganized credit, with especially severe effects in the South. These effects continued until 1843, when commodity prices began to climb again. Plaintiff's counsel referred to "the extraordinary depreciation of property and prostration of credit then existing in Louisiana." 17 How. (58 U.S.) at 136. Obviously, in November, 1842, the parties agreed that the remaining obligation of $120,000, plus interest at ten per cent per annum (17 How. (58 U.S.) at 136), was roughly equivalent to the plantation and $32,000. Apparently, further severe deterioration of land values occurred immediately, for only forty days later Barrow sued to rescind: the plantation plus $32,000 must have been worth less than the $120,000 plus interest. See Ryner, "On the Crises of 1837, 1847, and 1857," 5 UNIV. STUDIES OF THE UNIV. OF NEB. 143 (1905).

42 During the course of the pleadings, in response to a so-called cross bill filed by Bisland asking specific performance of the contract of compromise, plaintiff sought to amend to add an alternative prayer, himself asking for specific performance. The Court held that it was error to permit an amendment allowing plaintiff to pray for diametrically opposed reliefs. The discussion of the amendment problem in no way diminished the force of the Court's holding and discussion of the nonjoinder point. On the contrary, it held that, even if the amendment were proper, the nonjoinder was as much of a bar to specific performance as to rescission. 17 How. (58 U.S.) at 146.

Louisiana against the two Mississippi endorsers (Bisland and a Mrs. Victoire Shields). The court's jurisdiction being based on diversity of citizenship, joinder of Shields and the four remaining endorsers would have ousted jurisdiction under the "complete diversity" doctrine of *Strawbridge v. Curtiss.*[43]

On appeal from the circuit court's decree for complainant, the Supreme Court held that the bill was not maintainable in absence of the five other parties to the compromise agreement. Assuming that there are three classes of parties to a bill in equity, viz., formal, necessary, and indispensable, it held the absent parties to belong to the third class. The Court, through Justice Curtis, indicated that indispensable parties are those

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience,"[44]

while necessary parties are those

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it . . . but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties."[45]

Taken together, these two formulations are susceptible to an interpretation which is not at variance with the tests above suggested. The "necessary party" statement recognizes that there is a desire to grant a plaintiff merited relief if that can be done without *factually* affecting other persons not before the court. If under the circumstances of an individual case it is possible to shape the decree so as to give some relief without affecting the absent person, then the absent one is termed, under the *Shields v. Barrow* formulation, a necessary party. Although his presence is desirable, the court may proceed to a decision in his absence, since a final decree *can* be made without affecting his interest and without leaving the

[43] 3 Cranch (7 U.S.) 267 (1806). See the discussion of this problem in the diversity section, III-D, below.

[44] 17 How. (58 U.S.) 130 at 139.

[45] Ibid.

controversy in such condition that its final termination is wholly inconsistent with equity and good conscience. More simply stated the formulation is to this effect: if the court can proceed to a meaningful decree without affecting the interest of the absent person, that absent person is at most a "necessary" party; if the circumstances are such that the court cannot so proceed, then the absent one is an "indispensable" party.

The key to the Supreme Court's application of its suggested formulation to the facts of *Shields v. Barrow* lies in the interpretation given the word "without . . . affecting that interest." The Court must have meant "without factually affecting that interest,"[46] since any other interpretation would make the statement pointless. It would be foolish to say that a court is powerless to proceed if it cannot make a final decree without "legally affecting" the interest of an absent person, since nothing the court can possibly do will legally affect such an interest.[47] This view of the test's meaning (*factual* effect) indicates the necessity of a thorough consideration of the circumstances of the case,[48] which, in turn, might well have led the Court in this case to the conclusion that it should proceed despite the absence of Mr. Shields and the four endorsers. It is difficult to see that the absent persons would be harmed in any way in this action, even by a judgment for plaintiff. The compromise agreement would still be binding on Barrow as to them, and there is nothing impossible or even absurd in an agreement which is declared invalid as to some of the parties but remains binding as to others, unless some kind of an interdependent performance was contemplated.[49] Further, although the validity of the agreement is in issue in this litigation, plaintiff's ultimate purpose *in this suit*

[46] See Young v. Swafford, (Mun. Ct. D.C. 1954) 102 A. (2d) 312 at 313.

[47] But cf. McArthur v. Rosenbaum Co., (3d Cir. 1950) 180 F. (2d) 617 at 621; Samuel Goldwyn, Inc. v. United Artists Corp., (3d Cir. 1940) 113 F. (2d) 703 at 707.

[48] ". . . [M]uch will turn on the substantiality of the asserted interest which, it is claimed, will be affected by the determination of the issues raised by the complaint. When the existence of interests in third persons is conceded, the problem is merely one of appraising the effect an adjudication in the pending action will have on those interests." Medina, J., in Zwack v. Kraus Bros. & Co., (S.D. N.Y. 1950) 93 F. Supp. 963 at 965.

[49] Compare the situation in which one of several contracting parties is discovered to be a minor. Is there doubt that the agreement will be held binding on the other parties, provided, of course, that the essential aims of the agreement can be accomplished in his absence? Obering v. Swain-Roach Lumber Co., 86 Ind. App. 632, 155 N.E. 712 (1927); Gray v. Grimm, 157 Ky. 603, 163 S.W. 762 (1914); Cole v. Manners, 76 Neb. 454, 107 N.W. 777 (1906); Hartness v. Thompson, 5 Johns. (N.Y.) 160 (1809). That a different result may obtain in suits to cancel for fraud, see Warfield v. Marks, (5th Cir. 1951) 190 F. (2d) 178 at 180: "Since fraud vitiates everything it touches, it would be impossible to cancel this [consent] judgment on the ground of fraud as to everyone except the Sohio Petroleum Company, and leave it intact as to said company."

is not to obtain a declaration of invalidity of the agreement as against the world but to determine his right to payments from these two defendants under the original notes.[50]

There would appear to be two possible objections to permitting this action to proceed to a determination. One, the court may feel that it is inequitable to permit Barrow to avoid the compromise agreement as to two apparently solvent debtors and yet, as against the Louisiana parties, have a right to the possession of the land under the compromise. Two, the courts may be burdened with a second—perhaps a third—suit. The former objection could be obviated, as is discussed below, by a decree conditioned on plaintiff's obtaining a like decree in another action against the Louisianans. This leaves—indeed assures—the latter as the principal objection. As against this, if Barrow is not permitted to maintain this action, he is placed in a most unsatisfactory position. He will be met with the same objection in a suit against the Louisiana purchaser and endorsers, and there is no indication that he can obtain service on Shields and all the endorsers in any one jurisdiction except fortuitously. Since neither federal nor state process can proceed beyond the boundaries of the state in which the court sits, he is remediless.[51] (Indeed, one may argue from this decision that reformation- and rescission-proof agreements may be entered into if care is taken to select signatories with proper diversity of citizenship.[52])

The facts in the opinion are insufficient to demonstrate that this result is a just one. At least it is clear that the technical nature of the determination bears no necessary relationship to the equities involved. In effect, the Court is permitting the two defendants to say, "We can use your inability to sue the absent parties to defeat your attempt to avoid the agreement as to us."[53] Although it cannot be denied that a court, and especially an equity court, "delights" to do justice by units and not by halves,[54] and

[50] Oxley v. Sweetland, (4th Cir. 1938) 94 F. (2d) 33.

[51] This problem is discussed again in the section dealing with federal cases in which jurisdiction is based on diversity (III-D, below).

[52] In Martin v. Chandler, (S.D. N.Y. 1949) 85 F. Supp. 131, the court characterized as bizarre such a possibility where applied to the rhetorical suggestion that conspirators to violate the antitrust laws might immunize themselves against injunctive relief by vesting the power of direction and decision in an arbiter or industrial czar who is inaccessible to service of process. However, the possibility is real under Shields v. Barrow if the sundry signatories have genuine interests under the agreement.

[53] See the quotation from Kroese v. General Castings Corp., (3d Cir. 1950) 179 F. (2d) 760 at 762-763, set forth in note 18 supra.

[54] See note 63 infra.

that therefore the Court would prefer to see the compromise agreement sustained or set aside as to all, it is equally plain that in this situation there is no forum in which Barrow may have a hearing on the merits of his claim.[55] The decision may do more to leave the controversy "in such a condition that its final termination may be wholly inconsistent with equity and good conscience" than if the court had elected to proceed to the merits of the case before it.[56]

Accordingly, if, as the language of the formulation seems to indicate, the Supreme Court intended to employ a test based upon the possibility of a factual effect upon the interest of an absent person its conclusion conceivably should have been different. At very least it should have reached that conclusion on the basis of answers to the questions suggested in its statement of the applicable test. Instead, the Court lapsed into the terminology of "separable rights," saying:

> "A bill to rescind a contract affords an example of this kind [i.e., of indispensable parties]. For, if only a part of those interested in the contract are before the court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting parties restored to their former condition, as to the others. We do not say that no case can arise in which this may be done; but it must be a case in which the rights of those before the court are completely separable from the rights of those absent, otherwise the latter are indispensable parties."[57]

The Court went on to hold that plainly "the circuit court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons,"[58] and that the original bill ought to have been dismissed.

Again, although a court might reach the conclusion that it ought not to proceed in such a case without Shields and the other endorsers, it should base its decision on considerations like those suggested above and not on the bald assumption that the rights of the parties to the compromise agreement were "inseparable." Stated in

[55] "Such a result should be avoided if possible." Black River Reg. Dist. v. Adirondack League Club, 282 App. Div. 161 at 172, 121 N.Y.S. (2d) 904 (1953).

[56] See Choctaw and Chickasaw Nations v. Seitz, (10th Cir. 1951) 193 F. (2d) 456; United Lacquer Mfg. Corp. v. Maas & Waldstein Co., (D.C. N.J. 1953) 111 F. Supp. 139.

[57] 17 How. (58 U.S.) 130 at 140. Cf. Kleinschmidt v. Kleinschmidt Laboratories, Inc., (N.D. Ill. 1950) 89 F. Supp. 869.

[58] 17 How. (58 U.S.) 130 at 142.

other terms, the Supreme Court was entitled to hold, as it impliedly did, that there would be more inequity in rescinding the agreement as to Bisland and Mrs. Shields alone than in foreclosing Barrow from all relief on what may, for aught that appears, have been a meritorious claim.[59] But one could place more confidence in the holding if there were an explicit statement that such factors were actually considered.

It helps not at all to say that the rights of the parties, absent and present, are inseparable, first because it does not appear from anything the Court says that it is demonstrably true, and second because that is a result, not a cause. When are the rights of *A* and *B* inseparable? Whenever they must sue together. When must they sue together? Whenever their rights are inseparable. This obviously circular "reasoning"[60] not only produces no correct answers except fortuitously but it has the dangerous faculty of hiding its own weakness. Judges, with human preference for the simplicity and apparent certainty of pat concepts and rules of thumb, tend to lapse into the terminology of joint rights, inseparable rights, and the like, instead of striving (through factual analysis) for a balance of equity and convenience. The reader of many opinions gains the impression that these terms, when used, follow rather than precede the courts' decisions on joinder issues. What was a result has become a cause. Of this, however, few seem aware, including the Supreme Court of *Shields v. Barrow*. The excellent statement of principles governing compulsory joinder was practically ignored, the Court having yielded to the temptation to justify its holding by the application of labels which are barren of meaning in the procedural context.

[59] "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done. . . .[T]he rule as stated is intended for the benefit of a plaintiff whose bill sets forth a cause of action *which he should, if possible, be given an opportunity to prove. . . .*" Bourdieu v. Pacific Western Oil Co., 299 U.S. 65 at 70-71 (1936) (emphasis supplied).

[60] This point is explored in the section dealing with joint obligations (III-B, below). Compare the unhelpful explanation of the term "joint interest" in Field v. True Comics, Inc., (S.D. N.Y. 1950) 89 F. Supp. 611 at 613: "Rule 19(a) [of the Federal Rules of Civil Procedure] provides: 'Persons having a joint interest shall be made parties. . . . When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.' The term 'joint interest' must be construed to mean those who would be necessary or indispensable parties under the old practice." In other words, necessary and indispensable parties shall be made parties! See also United States v. Washington Institute of Technology, (3d Cir. 1943) 138 F. (2d) 25; Empire Ordnance Corp. v. United States, (Ct. Cl. 1952) 108 F. Supp. 622 at 623. One source of the trouble seems to be 2 MOORE, FEDERAL PRACTICE §19.02 (1938), which has been much quoted and cited. See also 3 MOORE, FEDERAL PRACTICE, 2d ed., 2144 (1948).

Of course, the principles of required joinder of parties did not originate in 1854. The Court in *Shields v. Barrow* had a body of authority on which to build. There were, for example, earlier English cases which stressed the impropriety of a procedure which would leave defendant open to two or more lawsuits for the same alleged wrong.[61] A standard English equity text implied that this factor—double harassment—was the key to the requirement of party joinder.[62] In other cases the coin was reversed and the emphasis was on opposition to multiple suits generally, as stated in the maxim that equity delights to do justice completely and not by halves.[63] At the state level, the New York Code of Civil Procedure as early as 1851 provided that "when complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in."[64]

The first United States Supreme Court case on the point was *Russell v. Clarke's Executors,*[65] decided in 1812. Citing no authority,[66] the Court, through John Marshall, held that it could not proceed to a decision in the absence of persons whose interests would be affected. No mention was made of avoiding double vexation. In the next case, *Cameron v. M'Roberts,*[67] although there was reference to possible effect on absent persons, the Court stated bluntly that if there was a joint interest vested in parties present and persons absent, "the court had no jurisdiction over the cause. If a distinct interest vested . . . , so that substantial justice (so far as he was interested) could be done without affecting the other

61 Hamm v. Stevens, 1 Vern. 110, 23 Eng. Rep. 351 (1682); Leigh v. Thomas, 2 Ves. Sr. 312, 28 Eng. Rep. 201 (1751).

62 MITFORD (Lord Redesdale), A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY, 2d ed., 220 (1789).

63 Knight v. Knight, 3 P. Wms. 331 at 334, 24 Eng. Rep. 1088 (1734); Camp v. Boyd, 229 U.S. 530 at 551-552 (1913); McPherson v. Parker, 30 Cal. 456 at 458 (1863); CALVERT, PARTIES TO SUITS IN EQUITY, 2d ed., 2 (1847).

It may be argued that the statement is not a maxim but a "mere descriptive statement of the usual processes of equity." MCCLINTOCK, EQUITY, 2d ed., 52, n.18 (1948). Pomeroy does not include it in his list of equity maxims. POMEROY, EQUITY JURISPRUDENCE §363 (1881). But the United States Supreme Court has said, "It is a familiar *maxim* that 'a court of equity ought to do justice completely, and not by halves'. . . ." Greene v. Louisville & Interurban R.R., 244 U.S. 499 at 520 (1917) (emphasis supplied).

64 Sec. 122.

65 7 Cranch (11 U.S.) 69 (1812).

66 In 1806 the United States Circuit Court for the District of Pennsylvania had distinguished between "active" and "passive" parties—"between those who are so necessarily involved in the subject in controversy, and the relief sought for, that no decree can be made without their being before the court; and such as are formal, or so far passive, that complete relief can be afforded to those who seek it, without affecting the rights of those who are omitted." Joy v. Wirtz, (C.C. Pa. 1806) 13 Fed. Cas. 1172 at 1173, No. 7,554.

67 3 Wheat. (16 U.S.) 591 (1818).

defendants, the jurisdiction of the court might be exercised as to him alone."[68] *Shields v. Barrow* cites this case, and it seems probable that it is the source of the aberration which led the Court after its initial statement to discuss separability of rights rather than factual effect on absent persons and the equity of the end result. It is at the point of *Cameron v. M'Roberts,* also, that we first note the term "jurisdiction" being used. Although it seems now well settled that the party defect is not jurisdictional,[69] the erroneous use of the term persists.[70]

[68] Id. at 593-594. The opinion was per curiam.

[69] "This objection does not affect the jurisdiction, but addresses itself to the policy of the Court." Elmendorf v. Taylor, 10 Wheat. (23 U.S.) 152 at 166 (1825). "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground, that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." Mallow v. Hinde, 12 Wheat. (25 U.S.) 193 at 198 (1827) (quoted in Shields v. Barrow). "It is often said that a court of equity has no jurisdiction of a creditors' bill, . . . if an indispensable party is not on the record. This is not an accurate use of the term. If the relief sought is of an equitable character, and the parties against whom it is sought are in court, it is clear that a court of equity has jurisdiction." Dyer v. Stauffer, (6th Cir. 1927) 19 F. (2d) 922. And see the cases collected in Sneed v. Phillips Petroleum Co., (5th Cir. 1935) 76 F. (2d) 785 at 789.

[70] "In cases where there is error in nonjoinder of parties . . . the courts have fallen into common error by designating the error as 'jurisdictional.'" Washington v. United States, (9th Cir. 1936) 87 F. (2d) 421 at 427.

"[T]he rule as to indispensable parties is neither technical nor one of convenience; it goes absolutely to the jurisdiction, and without their presence the court can grant no relief." 16 Cyc. 189 (1905) (citing, mirabile dictu, Mallow v. Hinde, supra note 69). The publication of the "error" in this once widely used encyclopedia doubtless helped it persist. And see West Coast Exploration Co. v. McKay, (D.C. Cir. 1954) 213 F. (2d) 582, cert. den. 347 U.S. 989 (1954); American Falls Reservoir District v. Crandall, (9th Cir. 1936) 85 F. (2d) 864; Lawrence v. Southern Pacific Co., (C.C. N.Y. 1910) 180 F. 822, revd. sub nom. Bogart v. Southern Pacific Co., 228 U.S. 137 (1913); Paasche v. Atlas Powder Co., (N.D. Ill. 1939) 31 F. Supp. 31; Riggs v. Moise, 344 Mo. 177, 128 S.W. (2d) 632 (1939); Hartley v. Langkamp, 243 Pa. 550, 90 A. 402 (1914).

The improper use of the terminology of "jurisdictional defect" here may not be quite so common as the Ninth Circuit suggests, at least in the federal courts, for two reasons:

(1) In diversity cases the possibility of having to join a person whose presence would destroy complete diversity may lead a court to talk about jurisdiction generally, when its concern in fact is the approaching destruction of diversity jurisdiction in the particular case. For example, Ohlinger cites Calcote v. Texas Pacific Coal & Oil Co., (5th Cir. 1946) 157 F. (2d) 216, as holding that failure to join an indispensable party goes to the jurisdiction of the court. 3 OHLINGER, FEDERAL PRACTICE 361-362 (1948). Yet on rehearing in the same case the opinion states: "The question of indispensable parties is primarily a matter of equity jurisprudence, sometimes of due process of law; but the bringing in of such parties may present a federal jurisdictional question if federal jurisdiction depends wholly upon diversity of citizenship. Therefore, we said that the question of dispensable [sic; read "indispensable"] parties was inherent in the issue of federal jurisdiction." 157 F. (2d) 216 at 224. In the diversity context mention of jurisdiction is more nearly apt, although still likely to confuse the issue as to whether the court has jurisdiction to proceed in the controversy between the parties already in court.

(2) Before the 1948 amendment, Federal Rule 12(b) contained no provision for presenting by motion an objection to failure to join an indispensable party but did allow

In 1824, 1825, and 1826, John Marshall wrote the opinions in three cases which dispensed with joinder of persons substantially interested in the controversy.[71] In each instance, the failure to join was for good cause, as where the person was not subject to the court's process. In the first two of these, it was felt that the purpose of the suit could be achieved without the absent one. Said Marshall,

> "Courts of equity require, that all the parties concerned in interest shall be brought before them, that the matter in controversy may be finally settled. This equitable rule, however, is framed by the Court itself, and is subject to its discretion. . . . [B]eing introduced by the Court itself, for the purposes of justice, [the rule] is susceptible of modification for the promotion of those purposes."[72]

In the third, the Court remanded the case and directed the joinder of absent heirs but provided that the interest of any who could not be brought before the court should remain subject to the lien in question. In 1815 the New York Court of Chancery, in a suit to set aside a deed, dispensed with the joinder of persons who had received deeds from plaintiff to the same property.[73] It said that "The general rule, requiring all persons interested to be parties, ought to be restricted to cases of parties to the interest involved in the issue, and necessarily to be affected by the decree. It is, besides, a rule adopted for convenience merely, and is dispensed with when it becomes extremely difficult or inconvenient."[74] Lord

a motion for lack of jurisdiction over the subject matter. In such circumstance the following language may not be surprising from a court striving to supply an omitted device: ". . . under Rule 12(b)(1) the lack of jurisdiction over the subject matter should still be construed to include a defense presentable by plea in bar when that plea goes directly to the want of jurisdiction of the Court because of a defect of parties through the absence of an indispensable party defendant." Hale v. Campbell, (N.D. Iowa 1941) 40 F. Supp. 584 at 588. However, this case might be placed also in the class discussed in the preceding paragraph because the absent persons here were citizens of the same state as plaintiff, who would be aligned against them.

[71] Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 738 (1824); Elmendorf v. Taylor, 10 Wheat. (23 U.S.) 152 (1825); Harding v. Handy, 11 Wheat. (24 U.S.) 103 (1826).

[72] Elmendorf v. Taylor, 10 Wheat. (23 U.S.) 152 at 166-167 (1824). Cf. Parker Rust-Proof Co. v. Western Union Tel. Co., (2d Cir. 1939) 105 F. (2d) 976, cert. den. 308 U.S. 597 (1939).

[73] Wendell v. Van Rensselaer, 1 Johns. Ch. (N.Y.) 344 (1815). But note the dissimilar result in Shaver v. Brainard, 29 Barb. (N.Y.) 25 (1859), after §122 of the 1848 Code of Procedure was amended in 1851 to provide that "when a complete determination of the controversy cannot be had without the presence of other parties, the court *must* cause them to be brought in." (Emphasis supplied; the italicized word read "may" in the 1848 version.)

[74] 1 Johns. Ch. (N.Y.) 344 at 350.

Eldon had put it as broadly when he called attention to authorities holding that where joinder is impracticable the rule is not to be stressed for it would destroy the very purpose for which it was established. Said he, "I should hesitate to determine, that a person, having a demand upon the whole and every part of the moiety, does not do enough, if he brings all whom he can bring."[75]

In 1827 was decided the last of the important predecessors of *Shields v. Barrow. Mallow v. Hinde*[76] noted, citing the foregoing Supreme Court cases, that there is no dispensing with a party whose rights "lie at the very foundation of the claim of right by the plaintiffs."[77] However, even here it may be possible to grant some relief in the premises by employing a decree which will make the granting of the relief sought contingent on plaintiff's obtaining an adjudication elsewhere, or the court may retain jurisdiction pending other developments. Even without a recital of the particular facts in *Mallow v. Hinde,* the following dictum from the opinion clearly suggests some of the possibilities:

> "And if it had been shown to the Circuit Court, that from the incapacity of that Court to bring all the necessary parties before it, and that Court could not decide finally the rights in contest, the Court, in the exercise of a sound discretion, might have retained the cause, and the injunction on the application of the complainants, until they had reasonable time to litigate the matters of controversy between them, and Taylor and the Beards, in the Courts of the State, or such other Courts as had jurisdiction over them; and if then it was made to appear by the judgment of a competent tribunal, that the complainants were equitably interested with the rights of Taylor, the trustee, and the cestuis que trust in the survey No. 537, the Circuit Court could have proceeded to decree upon the merits of the conflicting surveys.
>
> "Such a proceeding would seem to be justified by the urgent necessity of the case, in order to prevent a failure of justice; and the cause would have remained under the control of the Circuit Court, so as to have enabled it to prevent unreasonable delay, by the negligence or design of the parties, in litigating their rights before some competent tribunal."[78]

[75] Adair v. New River Co., 11 Ves. 429 at 444, 32 Eng. Rep. 1153 (1805). Cf. Cockburn v. Thompson, 16 Ves. 321, 33 Eng. Rep. 1005 (1809).

[76] 12 Wheat. (25 U.S.) 193 (1827).

[77] Id. at 198.

[78] Id. at 198-199.

A similar suggestion appeared in *Russell v. Clark's Executors,*[79] the first of these cases, where the Court mentioned the possibility of suspending the effect of the decree sought until the validity of trust deeds between parties present and persons absent should be decided. The suggestion was dictum because other difficulties made such alternative impractical. But the concept of a decree shaped to fit the circumstance was not unknown in 1854—a decree which would protect absent persons, give plaintiff at least some merited relief, and guard against an unconscionable result.[80]

In the light of these cases, was the result in *Shields v. Barrow* required? Proper?

No one would deny that the absent five should have been joined if possible. However, it seems equally clear that the Court was not justified in refusing plaintiff permission to proceed against the present two if (a) plaintiff would be satisfied with that degree of relief, (b) plaintiff otherwise could have no relief whatever, (c) the interests of the absent five would not be affected adversely, whatever the outcome of the case on the merits, and (d) the "final termination [would not] be wholly inconsistent with equity and good conscience."[81] The first two conditions plainly were present in *Shields v. Barrow.* As to the third and fourth, one can say only that the opinion is without any indication that there would have been an adverse effect on the absent five or that there was any obstacle to a conditional decree by which to avoid the possible inequity in Barrow's having his cake and eating it too.

There is cause for keen regret that the Supreme Court did not see fit to work out some kind of conditional decree, for which there was precedent. As an individual case, *Shields v. Barrow* is no more important than any of the thousands decided year by year. Indeed, the result may, accidentally, have been a just one. But as a precedent, *Shields v. Barrow* towers above the other cases on the subject. It is looked to as the fountainhead of compulsory joinder law. Its language has become almost axiomatic and its method standard. If, then, Justice Curtis had but mentioned the possibility, even if only to dismiss it, of framing a decree which would provide Barrow

[79] 7 Cranch (11 U.S.) 69 (1812).

[80] See also two early opinions by Joseph Story, both containing extensive statements of joinder principles: West v. Randall, (C.C. R.I. 1820) 29 Fed. Cas. 718, No. 17,424; Wood v. Dummer, (C.C. Me. 1824) 30 Fed. Cas. 435. Cf. Porter v. Clements, 3 Ark. 364 (1841).

[81] The quotation is from Shields v. Barrow, 17 How. (58 U.S.) 130 at 139. Compare these tests with the four in Washington v. United States, (9th Cir. 1936) 87 F. (2d) 421 at 427-428.

some relief while protecting the absent persons, the course of case development could well have been different and wiser.

Compare with Justice Curtis' uninspired decree in the *Shields* case the unusual opinion of Judge Goodrich for the Third Circuit in *Kroese v. General Steel Castings Corporation.*[82] Kroese, a New York resident, sued in a federal district court in Pennsylvania to compel the declaration and payment of accumulated dividends on stock which he held in defendant corporation, incorporated in Delaware but with its principal office in Pennsylvania. That court entered an interlocutory order directing plaintiff to make at least a majority of the board of directors parties to the action. Actually, there was no one state or federal district in which a majority resided, and none would appear voluntarily to confer jurisdiction and venue. The district court held that it could not place itself in the shoes of the directors and declare the dividends, but that it could only order the directors to declare the dividends. This it could not do without in personam jurisdiction over a majority of the directors, and it dismissed the action.[83]

The court of appeals reversed, stating that even though the individual directors are joined as parties, they are not called on to exercise any business judgment but to perform a ministerial act under the court's mandate.[84] "The duty of a corporation to pay dividends then and there has been imposed by the judgment of the court, not by the ayes and nays of the members of the board."[85]

But this did not solve the problem of how to make the directors do what the court might order done. On this point, Judge Goodrich said:

> "But how can the chancellor's action be made effective? To doubt its effectiveness is to doubt the power of a court of equity when wielded by a chancellor with legal imagination. It is certainly true that he cannot do anything to directors who are not subject to his jurisdiction. But he can do a great deal to the property of the corporate group which is within his jurisdiction. The Pennsylvania courts know how to sequester assets of foreign corporations when the case is such that this

82 (3d Cir. 1950) 179 F. (2d) 760, cert. den. 339 U.S. 983 (1950). For two of the many law review discussions of this case see notes, 50 COL. L. REV. 997 (1950); 49 MICH. L. REV. 275 (1950).

83 Kroese v. General Steel Castings Corp., (E.D. Pa. 1949) 9 F.R.D. 273.

84 For purposes of determining indispensability the court assumed plaintiff's allegations to be true. 179 F. (2d) 760 at 763.

85 Id. at 764. Cf. W. Q. O'Neall Co. v. O'Neall, 108 Ind. App. 116, 25 N.E. (2d) 656 (1940); Rockenfield v. Kuhl, 242 Iowa 213, 46 N.W. (2d) 17 (1951).

> form of relief is appropriate and the federal courts are equally potent in this respect. If the formal act by the board of directors is necessary under the Delaware General Corporation Law to regularize the dividends to which shareholders are entitled, we cannot think that a receivership or sequestration of a foreign corporation's property will not produce the result. Equity courts have known for a long time how to impose onerous alternatives at home to the performance of affirmative acts abroad as a means of getting those affirmative acts accomplished."[86]

Judge Goodrich's indirect approach to a desired goal is simply an unusual application[87] to the parties problem of a familiar concept. A court—especially a court of equity—undoubtedly will employ means within its power to accomplish, indirectly, results apparently outside its power. Thus, in the famous case of *Lumley v. Wagner*[88] equity restrained Johanna Wagner, "Cantatrice of the Court of His Majesty, the King of Prussia," from singing elsewhere during her contract with Mr. Lumley even though it had no power to compel her to perform under Lumley's auspices, Lord Chancellor St. Leonards suggesting that the restraint might "possibly cause her to fulfil her engagement."[89] In the *Salton Sea Cases*,[90] the court restrained defendant from diverting the waters of the Colorado River to the damage of property within its jurisdiction, notwithstanding the defendant would find it necessary in complying with the decree to perform work upon irrigation intakes in Mexico. Both the property injured and the party charged with commission of the injury were in the jurisdiction, and it was held insignificant that acts out of the jurisdiction would be required. So-called quasi in rem jurisdiction in the law courts seems to fit into the picture here, too.

[86] 179 F. (2d) 760 at 764-765; the court's footnotes are omitted. *Accord:* Whittemore v. Continental Mills, (D.C. Me. 1951) 98 F. Supp. 387; Swinton v. W. J. Bush & Co., 199 Misc. 321, 102 N.Y.S. (2d) 994 (1951), affd. 278 App. Div. 754, 103 N.Y.S. (2d) 1019 (1951). But a contrary rule, leaving the plaintiff-stockholder without a remedy, appears to obtain in a majority of cases. See, e.g., Schuckman v. Rubenstein, (6th Cir. 1947) 164 F. (2d) 952, cert. den. 333 U.S. 875 (1948); Tower Hill Connellsville Coke Co. v. Piedmont Coal Co., (4th Cir. 1929) 33 F. (2d) 703, rehearing den. 35 F. (2d) 179 (1929), cert. den. 280 U.S. 607 (1930); Galdi v. Jones, (2d Cir. 1944) 141 F. (2d) 984 at 991; Gesell v. Tomahawk Land Co., 184 Wis. 537, 200 N.W. 550 (1924); note, 49 MICH. L. REV. 275 (1950).

[87] See note, 49 MICH. L. REV. 275 at 276, at note 2 (1950).

[88] 1 DeG. M. & G. 604, 42 Eng. Rep. 687 (1852).

[89] Id. at 619. Later in the same paragraph is this strange disavowal: ". . . the injunction may also, as I have said, tend to the fulfilment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly." P. 620.

[90] (9th Cir. 1909) 172 F. 792, cert. den. 215 U.S. 603 (1909).

The *Kroese* case is not unique, however, even in applying processes of "indirection" to joinder problems. For example, in a suit seeking reformation of a contract and an injunction against interference by third persons with the reformed contract, the injunction may issue despite the absence of the promisor.[91] Thus are enforced rights under an agreement as "reformed" even though reformation is not, indeed cannot, be decreed. And where a trustee is sued for an accounting by less than all beneficiaries, the court may explore sundry devices to make a partial decree fair. This was done by the Colorado court in *Conroy v. Cover*,[92] which said:

> "[T]he proposition is that unless all are made parties and served, none can compel the payment of his share. This would be indeed 'twisting the strands of precedent into a rope with which to strangle justice.' Any trustee could conspire with one cestui que trust, take the whole estate, and the others could only appeal to a paralyzed court. . . . [If joinder be required] in the present case the plaintiffs would be helpless.
>
> ". . . [S]o this case is, or at least may prove to be, a mere equal division of property not hitherto accounted for by the trustee, and it will therefore probably be easy to save the rights of the absent beneficiaries. But even if that be not so, their rights can be, or it may appear from the evidence that they can be, saved in other ways; e.g., by a fair division according to the evidence, and a reservation during the period of the statute of limitations of a sum sufficient to protect them against any error or a bond to the same end or a bond to protect the trustee or some other device which will be safe.
>
> ". . . It is the duty of the court, then, to proceed with the case as far as it can."[93]

Or a court may condition its decree on plaintiff's filing a disclaimer of intent to interfere with arrangements affecting persons not before the court.[94] When it became apparent in *Shields v.*

[91] Nokol Co. v. Becker, 318 Mo. 292, 300 S.W. 1108 (1927).

[92] 80 Colo. 434, 252 P. 883 (1927). But see Baker v. Dale, (W.D. Mo. 1954) 123 F. Supp. 364 at 370.

[93] 80 Colo. 434 at 437, 441.

[94] Hudson v. Newell, (5th Cir. 1949) 174 F. (2d) 546. Although beside the narrow point, it is useful to mention here the cases holding that compulsory joinder rules apply to declaratory judgment actions. Samuel Goldwyn, Inc. v. United Artists Corp., (3d Cir. 1940) 113 F. (2d) 703; Central Westchester Humane Society v. Hilleboe, 202 Misc. 873, 115 N.Y.S. (2d) 769 (1952); Commercial Casualty Ins. Co. v. Tri-State Transit Co., 177 Tenn. 51, 146 S.W. (2d) 135 (1941). Some persons, of course, ought to be made parties (necessary) if the most efficient determination is to be made; only for good reason (e.g., unavailability, destruction of diversity) should they be excused. A court may refuse to proceed to a declaratory judgment in *A*'s absence on the ground that the judgment as

Barrow that the plaintiff was about to be left remediless, surely the Court could have devised a decree—or have observed the availability of a decree—which would give him a chance to prove his claim against the two defendants. The exact form of the condition or limitation on the decree would depend on the Court's response to the particular facts. Likely it would take the form of a provision that the decree should not become effective until plaintiff obtained a like decree against the other five in a Louisiana court, thus preventing him from collecting purchase money from the defendants while holding the land as to the Louisiana five.[95] The important point is that the Court made no move to consider this possibility even though precedent was at hand.[96] It apparently was insensitive to the fact that "It would be most unjust if he could not prove that claim for the lack of a proper forum."[97]

The result of *Shields v. Barrow* was to embed in American procedural law the now familiar division of required parties into categories (necessary and indispensable)—a classification not inherently bad) and a shoddy and unimaginative method of its application to individual cases. It is not surprising that other courts in picking up that classification have adopted also the Supreme Court's separability-of-rights terminology. It is one thing to determine that in the absence of some persons a case may not proceed ("indispensable" parties) and in the unavoidable absence of others a case may proceed ("necessary" parties). It is quite another to believe that certain persons, depending on the nature of their rights ("common," "joint," "united in interest"), are automati-

between the present plaintiff and defendant would not terminate the uncertainty or controversy which gave rise to the proceeding. Queens County Group v. Home Loan Bank Board, (E.D. N.Y. 1952) 104 F. Supp. 396; Commercial Casualty Ins. Co. v. Tri-State Transit Co., supra; Uniform Declaratory Judgment Act §6. However, it is difficult to imagine the circumstance in which a court reasonably could refuse to proceed simply because of adverse effect on *A*. But cf. Bendix Aviation Corp. v. Kury, (E.D. N.Y. 1950) 88 F. Supp. 243. The judgment is not legally binding on *A*, and by its very nature it does not require the award of process or the payment of damages. It can disclaim determination of rights as against *A*. Thus, a useful, meaningful declaration of rights between plaintiff and defendant should not be blocked by unavailability of *A*. That is, the declaratory judgment may be shaped, as an equitable decree, to accomplish the possible.

95 See reference to Shields v. Barrow in New England Mutual Life Ins. Co. v. Brandenburg, (S.D. N.Y. 1948) 8 F.R.D. 151 at 154.

96 See notes 76 and 79 supra.

97 Kroese v. General Steel Castings Co., (3d Cir. 1950) 179 F. (2d) 760 at 765-766. Cf. Conroy v. Cover, 80 Colo. 434 at 441, 252 P. 883 (1927); Calcote v. Texas Pacific Coal & Oil Co., (5th Cir. 1946) 157 F. (2d) 216 at 224; Swinton v. W. J. Bush & Co., 199 Misc. 321, 102 N.Y.S. (2d) 994 (1951), affd. 278 App. Div. 754, 103 N.Y.S. (2d) 1019 (1951); all three cases note the obligation of the court to make an adjudication of the controversy presented if at all possible.

cally and for all time relegated to one class or the other. That simply is not so, but it is the kind of result which the *Shields v. Barrow* process invites. Similarly, there is an assumption, possibly due to heavy reliance on the necessary-indispensable terminology, that a court has discretion to proceed or not to proceed in one category ("necessary") and no discretion in the other ("indispensable"). Although true when applied to a party to which the court has attached one of these labels, the assumption is basically false in failing to recognize that there is initially a broad discretion in assigning a party to the one category or other.[98] Also, it is hard to understand, except by reference to *Shields v. Barrow*'s misleading silence on the point, why so few courts have been aware of the availability of a less-than-absolute decree to avoid a termination of litigation without a chance to explore the merits.

Because of the sometimes unfortunate consequences of heavy reliance on *Shields v. Barrow,* both holding and method, the classification in that famous case should be abandoned in favor of an informal, rational balancing of competing interests case by case—interests relating to the helplessness of plaintiff, double vexation of defendant, the possible effect on absent persons, the convenience of the court, and the "equity and good conscience"—in short, the justice—of the end result.

B. *In Cases Involving Contractual Obligations Jointly Owed or Owned*

(A Joint Is a Joint Is a Joint)

Obligations jointly owed or owned provide a case study in confusion between procedural rules (who is a required party) and substantive principles (what is a joint obligation or right). Superficially there appears no necessity here for involved weighing of competing interests to solve joinder problems in law cases seeking money judgments because the answers are so "simple": e.g., joint obligors are everywhere considered "necessary" parties. And it is a fact that case results seldom are shockingly bad. There is, how-

[98] Compare a similar fallacy in Rule 24 of the Federal Rules of Civil Procedure, purporting to distinguish between intervention of right and permissive intervention. The determination under Rule 24 (a) (3) of the question whether an applicant will be adversely affected by a distribution of property subject to the control of the court is a matter in which the court clearly has some discretion, even though an affirmative answer leads to intervention which is labeled "of right." And see note, 56 YALE L.J. 1088 at 1090-1091 (1947).

ever, a hole in the process which, when examined, illustrates further the true nature of the joinder inquiry.

The terminology of obligations is familiar: joint, several, joint and several. Whether the distinctions are as clear as the terms are simple is open to doubt. For joinder purposes, contract obligors and obligees need be placed in only two, instead of three, groups. When ownership or obligation is joint and several, or purely several, there exists at present no question of required joinder. The "several" element relieves the plaintiff of the need for suing more than one obligor or of joining with another obligee if there are plural obligees. This is virtually axiomatic.[99] It is only when the obligation is purely joint—either jointly owed or jointly owned—that compulsory joinder problems present themselves.

1. *Joint obligors.* The broad rules governing joinder of parties owing joint contractual duties are simply stated. In absence of statute, all joint obligors on contract or quasi-contract are required, if within the jurisdiction, to be joined as parties defendant in actions at law on the obligations.[100] A joint obligor's death or (other) absence from the jurisdiction permits the obligee to sue those remaining, as do infancy, insanity, or bankruptcy of one of the obligors.[101] Further, if less than all are sued, they may waive the defect and permit judgment to be taken against them.[102] It is true that many jurisdictions now have statutes erecting a presumption or rule that a joint promise creates a joint and several liability.[103] But if the statutory presumption is overcome and the obligation interpreted to be truly joint, traditional joinder requirements will be applied; and even if the obligation is read to be joint

[99] The statement in 2 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 63 (1950), that joint and several, and several, obligors are "merely necessary" is surely an inadvertence, as a reading of the context will show.

In the older cases, if a plaintiff sued more than one of joint and several obligors he was required to sue them all, on the ground that he was suing on the joint and not the several obligation. See note 115 infra. Hence it was possible for a nonjoinder question to arise in litigation over a joint and several obligation, but only to the extent that the plaintiff might be held to be pursuing his remedy on the joint right. But cf. Sechrist v. Palshook, (M.D. Pa. 1951) 95 F. Supp. 746.

[100] See 3 MOORE, FEDERAL PRACTICE §19.11 (1948); CLARK, CODE PLEADING, 2d ed., §59 (1947); CONTRACTS RESTATEMENT §117 (1932).

[101] Murphy's Admrs. v. Bank of Alabama, 5 Ala. 421 (1843) (death); Dennett v. Chick, 2 Me. (2 Greenl.) 191 (1823) (absence); Hartness v. Thompson, 5 Johns. (N.Y.) 161 (1809) (infancy); Noke and Chiswell v. Ingham, 1 Wils. 89, 95 Eng. Rep. 508 (1745) (bankruptcy).

[102] First Nat. Bank v. Hamor, (9th Cir. 1892) 49 F. 45; Allen v. Lucket, 26 Ky. (3 J.J. Mar.) 164 (1830); Ryckman v. Manerud, 68 Ore. 350, 136 P. 826 (1913).

[103] See note 139 infra.

and several, problems remain. For example, these statutes commonly do not change the rule that release of one discharges all.[104] Thus the question, although less important than formerly, is not moot.

It is evident immediately that joint obligors are not indispensable parties[105] in the sense that the court cannot proceed in the absence of one of them. Whenever absence from the jurisdiction excuses nonjoinder, it cannot be said that joinder is indispensable. That is so also if the parties sued can waive their possible objection to nonjoinder. Surely if a person's interest will be so adversely affected as to preclude the court from proceeding in his absence, that defect cannot be cured by action of his co-obligors who *are* before the court. Stated otherwise, by holding that joint obligors are merely necessary and not indispensable parties,[106] the courts must be held to have concluded that omission of the absent obligor will not injure his interest and will not impose upon the court and the present defendant substantial and unnecessary risk of repetitive litigation. But this conclusion seems not to appear explicitly in the cases.

Granting for the present that joint obligors are "necessary" parties, who are joint obligors? What is a joint obligation?

Joint promisors are considered liable as an indivisible unit. "The primary conception of a joint duty or obligation under a contract is that two or more persons are together bound as if they were a single person."[107] In law there is but one promise—one obligation. As put by Lord Justice Bowen,

> "There is in the cases of joint contract and joint debt as distinguished from cases of joint and several contract and joint and several debt, only one cause of action. . . . This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only wish to observe that whether or no the rule by the light of pure reason and unassisted by authority might or might not have recommended itself to modern minds, the rule is by no means a technical rule."[108]

104 The rule that release of one discharges all illogically applies to joint and several obligors. See 2 WILLISTON, CONTRACTS, rev. ed., §336 (1936).

105 But cf. Sundberg v. Goar, 92 Minn. 143, 99 N.W. 638 (1904).

106 Camp v. Gress, 250 U.S. 308 (1919).

107 2 WILLISTON, CONTRACTS, rev. ed., §316 (1936).

108 In re Hodgson, 31 Ch. Div. 177 at 188 (1885). The case involved a claim on a partnership debt pursued against the estate of a deceased partner. In the Bowen opinion there is inquiry into the distinction, if any, between the nature of such claim in law and

Glanville Williams, in an excellent monograph on joint obligations in English law, refers to Bowen's opinion and suggests that in the language of the civilians "the obligation is solidary, each promisor being liable in full *(in solidum)* on the single promise."[109] In theory the analogy is bad, because the civil law solidary or correal[110] obligation is nearer the common law joint and several obligation; it is not the equivalent of the purely joint obligation.[111] Indeed, in Louisiana solidary obligations are specifically equated with joint and several obligations.[112] And if there are—as ordinarily assumed—substantial differences between joint and joint and several obligations, Williams' likening the joint obligation to the solidary obligation is erroneous. But if—as argued below—there exist no important differences between joint and joint and several obligations, the solidary analogy is instructive. Both Professor Williams and Lord Justice Bowen subscribe to the general rule that a joint obligor who is sued alone and who does not object thereto may be held liable for the entire debt. And, as will be observed later, one co-debtor may well have to pay the entire judgment, since execution is several even though the judgment be joint.[113] These facts, however they may support the idea of liability of each debtor in full (which seems to be Williams' use of the term *in solidum*[114]), do not give support to the existence of fundamental, theoretical distinctions between joint obligations and joint

one in equity, there being some suggestion in the cases that although a partnership debt is joint at law it is joint and several in equity. But see 2 WILLISTON, CONTRACTS, rev. ed., §344, p. 1017, notes 9-10 (1936); Robertson v. Smith, 18 Johns. (N.Y.) 459 (1821).

109 JOINT OBLIGATIONS 33 (1949).

110 Whether solidary and correal are equivalents when employed in this context is a matter of dispute even among those learned in the civil law. See, e.g., the conflicting authorities cited in 2 WILLISTON, CONTRACTS, rev. ed., §319, n.3 (1936).

111 In addition, the joint obligation of civil law renders the obligors liable for only ratable shares, so that if two promise jointly to pay a sum of money, each is liable for half only. Thus there is a substantial difference between the civil law and common law joint obligations. 2 WILLISTON, CONTRACTS, rev. ed., §319 (1936); WILLIAMS, JOINT OBLIGATIONS 33, n.1 (1949); La. Civil Code (1870) art. 2086.

112 La. Civil Code (1870) art. 2082; Breedlove v. Nicolet, 7 Pet. (32 U.S.) 413 (1833); Garland v. Coreil, 17 La. App. 17, 134 S. 297 (1931).

113 But he has a right to obtain contribution from his fellow debtors. United States Fidelity & Guar. Co. v. Naylor, (8th Cir. 1916) 237 F. 314; In re Donlon's Estate, 203 Iowa 1045, 213 N.W. 781 (1927); Hoff v. Kauffman, 282 Pa. 471, 128 A. 120 (1925); 2 WILLISTON, CONTRACTS, rev. ed., §345 (1936).

114 Sometimes written "in solido." The use of the two terms interchangeably so irritated one James Burns, M.D., that in 1885 he wrote a small book by way of protest against the change from accusative case to ablative without awareness that "thereby the sense of the phrase is more or less changed." In solidum has thus been subjected to "curious barbarisms, solecisms, and improprieties." BURNS, IN SOLIDUM VS. IN SOLIDO: A CIVIL-LAW LITERARY CURIOSITY 3 (1885).

and several obligations. To the contrary, they suggest that the differences may be much less than commonly supposed.

What *are* the characteristics which are thought to distinguish joint from joint and several obligations?

Coming first to mind in the present context is joinder of parties. A joint obligor is distinguishable from a joint and several obligor by the joinder rule: joint obligors are those promisors who must be sued together, while joint and several obligors are those who may be sued separately.[115] Just like that! But of course it doesn't mean anything. Joint obligors are those who must be sued together; those who must be sued together are joint obligors. *X* is *Y*; *Y* is *X*. If there are no other and substantial factors producing the joinder requirement, it is a conclusion only and not a reason for the conclusion. It cannot be employed as a test of whether an obligation is joint. It has meaning only if it is a result flowing from the determination that an obligation is joint—a determination made on the basis of other attributes of joint liability which have some independence, some force of their own.

A second matter in respect of which joint obligors are said to differ from joint and several obligors is judgments. Upon the assumption that a joint obligation is indivisible, a judgment thereon must be a single judgment against all defendants.[116] Among the consequences said to flow from this fact are that on the death of one joint judgment debtor the whole (judgment) liability survives to the others,[117] a joint judgment (even as a joint liability before judgment) is released as to all by the release of one,[118] a judgment may not be rendered against any of the joint obligors if any one of

[115] It was held formerly that suit against joint and several obligors must be against one or against all, and not against an intermediate number. Cummings v. People, 50 Ill. 132 (1869); Claremont Bank v. Wood, 12 Vt. 252 (1840). The modern propriety of joinder of two or more severally liable effects a different result. This latter, incidentally, was always the rule as to joint tortfeasors.

[116] Harrington v. Bowman, 106 Fla. 86, 143 S. 651 (1932); United States Printing & L. Co. v. Powers, 233 N.Y. 143, 135 N.E. 225 (1922); Templeton v. Morrison, 66 Ore. 493, 131 P. 319 (1913); 2 WILLISTON, CONTRACTS, rev. ed., §329 (1936); WILLIAMS, JOINT OBLIGATIONS, c. 4 (1949).

[117] WILLIAMS, JOINT OBLIGATIONS §36 (1949). Again, however, there is a right to obtain contribution from the estate. Trego v. Estate of Cunningham, 267 Ill. 367, 108 N.E. 350 (1915); Sun River Stock & L. Co. v. Montana Trust & Savings Bank, 81 Mont. 222, 262 P. 1039 (1928); Wachovia Bank & Trust Co. v. Black, 198 N.C. 219, 151 S.E. 269 (1930).

[118] Clark v. Mallory, 185 Ill. 227, 56 N.E. 1099 (1900); Booth v. Campbell, 15 Md. 569 (1860). Cf. In re Kimbrough-Veasey Co., (N.D. Ga. 1923) 292 F. 757; Hale v. Spaulding, 145 Mass. 482, 14 N.E. 534 (1888).

them makes a successful plea,[119] and a judgment against less than all of joint promisors discharges the joint duty of the other joint promisors.[120]

In an earlier day all these things were true of judgments against two or more joint and several obligors; i.e., the judgment had to be joint because the only way the plaintiff could be suing two or more was on the joint portion of the joint and several liability. But now that obligors severally liable may be sued together, it arguably is possible to have joint and several judgments—a joint judgment against all and several judgments against each. This is the English view, although American courts would probably hold to the contrary on the ground that two judgments cannot be given against the same debtor.[121] As to the joint judgment in such circumstance, the foregoing characteristics still exist. Several judgments, however, are entirely independent of each other, with the result that there is neither survivorship nor vicarious effect of releases and pleas in bar, and a judgment for or against one or more of the other joint and several debtors does not discharge the several duty of the one not sued.[122]

All these various technical incidents ordinarily are unknown to the contracting parties and undoubtedly are not bargained for.

If any of these differences between joint judgments on the one hand and joint and several or several judgments on the other had a practical, economic effect upon the parties to the obligation, then the procedural distinctions would take on some importance. For example, if recovery could be had only to the extent that both obligors (upon becoming judgment debtors) were able to respond equally, *that* would be a consequence worth noting. Or if each

[119] Jonas v. Burks, 87 Fla. 68, 99 S. 252 (1924); Galt v. Hildreth, 100 Neb. 15, 158 N.W. 366 (1916); Pacific Southwest Trust & Savings Bank v. Mayer, 138 Wash. 85, 244 P. 248 (1926).

[120] There are numerous particular problems here, such as the effect of the availability of the statute of limitations to one co-debtor, infancy, bankruptcy, absence from the jurisdiction, set-off of a several liability against a joint judgment, etc. See generally 2 WILLISTON, CONTRACTS, rev. ed., §§329, 333 (1936); CONTRACTS RESTATEMENT §§118-119 (1932). See also Spaulding v. Ludlow Woolen Mill, 36 Vt. 150 (1863) (statute of limitations may discharge one defendant while other defendants are held); Kales v. Haughton, 190 Cal. 294, 212 P. 21 (1923) (ordinary individual indebtedness due from one of joint obligees may not be set off). Cf. cases in note 101 supra.

[121] WILLIAMS, JOINT OBLIGATIONS §37 (1949); 2 WILLISTON, CONTRACTS, rev. ed., §337 (1936); Stearns v. Aguirre, 6 Cal. 176 (1856).

[122] 2 WILLISTON, CONTRACTS, rev. ed., §§334, 337 (1936); CONTRACTS RESTATEMENT §123 (1932).

joint obligor (when a judgment debtor) were liable only to the extent of half the obligation so that recovery by plaintiff against defendant *B* was limited to half and against defendant *C* to the other half,[123] there again would be some justification for the existence of a classification of joint indebtedness, although suit against the two in one action would be necessary only as we seek to reduce the number of cases. But the plain fact is that neither of these results obtains, for even though the joint promisors are considered liable as an indivisible unit until time for satisfaction of plaintiff's judgment out of their property, the property of each then becomes liable severally for the whole of the debt. Plaintiff may pursue satisfaction of his judgment as he will between the two defendants.[124] The writ of execution based upon a joint judgment is joint in form (and so there is a technical distinction here), but it may be levied upon all or any of the persons named in it.[125] Thus, in the matter of execution of a judgment, a joint obligor stands in no different position from that of a joint and several obligor; in either instance the plaintiff may be expected to pursue the more accessible and responsible of the judgment debtors. Whatever the verbal differences between the two kinds of judgments, there is in fact no distinction of importance to be drawn between them.

Another respect in which joint and joint and several obligations are said to differ is that of survivorship. Upon the death of a joint debtor, his estate is freed from liability to the creditor; the joint debt ceases as to the deceased debtor, and the whole obligation is borne by his survivors.[126] Given a sufficient mortality rate, the whole liability ultimately devolves on the one survivor and, at his death, on his representative.[127] The survivorship rule does not apply, of course, to several obligations although applicable to the joint portion of a joint and several obligation.[128]

123 Compare with the civil law rule, note 111 supra.

124 Leinkauff & Strauss v. Munter, 76 Ala. 194 (1884); Bray v. Seligman, 75 Mo. 31 (1881); Saunders v. Reilly, 105 N.Y. 12, 12 N.E. 170 (1887).

125 Saunders v. Reilly, 105 N.Y. 12 at 21, 12 N.E. 170 (1887); Anderson v. Stayton State Bank, 82 Ore. 357 at 374, 159 P. 1033 (1916); 2 WILLISTON, CONTRACTS, rev. ed., §316, p. 928, §329, pp. 959-960 (1936); LINDLEY, PARTNERSHIP, 10th ed., 372 (1935). Cf. CONTRACTS RESTATEMENT §117 (1932).

126 Towers v. Moor, 2 Vern. 98 at 99, 23 Eng. Rep. 673 (1689): "Where two are jointly bound, and one dies, you must sue the survivor, and cannot maintain an action against the executor or administrator of him that is dead; but if bound jointly and severally, it is otherwise." Pickersgill v. Lahens, 15 Wall. (82 U.S.) 140 (1873); note, Survival of liability on joint obligations, 67 A.L.R. 608 (1930). Professor Williston suggests that the rule is by analogy to survivorship in joint estates in land. WILLISTON, CONTRACTS, rev. ed., §344 (1936).

127 CLARK, CONTRACTS, 4th ed., §207 (Throckmorton, 1931); WILLIAMS, JOINT OBLIGATIONS, c. 3 (1949).

128 2 WILLISTON, CONTRACTS, rev. ed., §344 (1936).

Is this another distinction without a difference? In most cases, yes, because of the existence of a right of contribution. All obligors who are liable *in solidum,* i.e., joint and joint and several debtors, have a right of contribution among themselves. Although they may modify the right by agreement, it is not dependent on contract.[129] Thus, if the plaintiff obtains satisfaction upon a joint judgment from but one obligor, that obligor is entitled to contribution from his fellows. The right of contribution exists quite independently of any present right of the obligee against the fellow debtors. It exists, for example, even though the creditor may not have had an enforceable claim against the non-paying debtors at the time for contribution.[130] Accordingly, a surviving debtor who pays the entire judgment may obtain contribution from the estate of the deceased joint debtor,[131] and it immediately becomes obvious that the survivorship rule means only that the plaintiff's suit is confined to the remaining debtors (or, if the question is one of compulsory joinder, that plaintiff need sue only the remaining debtors). The pecuniary liability of the decedent's estate is not altered. It is simply that its liability is owed not to the original creditor but to the surviving obligor who has discharged the debt. Therefore, if the surviving debtors and the estate of the deceased debtor are solvent, the survivorship rule does not affect the pocketbook of surviving debtors, of the estate, or of the promisee. Suit is brought against the survivors, judgment is executed, and contribution is obtained, by legal action if needed. If the estate is insolvent, no harm is done, since the creditor would have pursued his remedy against the solvent debtors anyway, and the right of contribution against a living bankrupt is of little more value to the responsible co-debtor than one against an insolvent estate. It is only when the deceased's estate is solvent and the surviving co-debtors insolvent that the survivorship rule effects a result which would not obtain on the death of a joint and several debtor, for judgment against the survivors is worthless and the creditor has no access to the estate.[132] There may be a tendency when dealing

[129] Tobias v. Rogers, 13 N.Y. 59 at 66 (1855).

[130] Statute of limitations having run as between obligee and one co-obligor does not prevent contribution liability. Quintin v. Magnant, 285 Mass. 450, 189 N.E. 209 (1934); Young v. Burnett, 81 N.H. 163, 127 A. 435 (1923). Cf. O'Keefe v. Baltimore Transit Co., 201 Md. 345, 94 A. (2d) 26 (1952); Gholson v. Savin, 137 Ohio St. 551 at 555, 31 N.E. (2d) 858 (1941).

[131] See note 117 supra.

[132] Equity occasionally gave relief in such cases where the deceased joint debtor had shared in the benefit for which the promise was given or where there had been fraud or

with this type of unfortunate result to dismiss it with a casual reference to the intent of the parties. They have, by their contract, by their voluntary action, brought themselves to this pass, and the creditor should not complain of the result. It is far more likely, however, that the creditor's present predicament was not foreseen—that there was no thought of the survivorship rule at all. For example, a frequent business transaction is the sale of goods by *X* to *Y* on credit. *Y*'s credit being limited, *X* insists that *Z*, a financially responsible person, join in giving a promissory note, and it is done. Subsequently, however, *Z* dies and *Y* becomes insolvent. *X*'s claim against *Y* is valueless, and he has no remedy against *Z*'s estate.[133] It is almost inconceivable that the parties contemplated such a situation at the transaction's inception. This arbitrary and usually inadvertent result is avoided in most American jurisdictions by statutes directing that joint obligations be construed as joint and several.[134]

There are other technical differences of limited application between joint and joint and several obligations. They relate to such matters as the effect of bankruptcy, the methods of extinguishing the cause of action, the effect of misrepresentation to one joint promisor, et cetera.[135] Here also is required considerable license to maintain that such results were intended by the contractors.

All of this merely suggests the large quantity of material dealing with each of the distinctions mentioned. Undoubtedly there do exist points at which joint obligations differ from joint and several obligations, although generations of lawyers have been trained to believe them more numerous and more important than they are. If these differences are intended by the parties, there is some justification for recognizing them. To the extent that they are unintended, they constitute a pointless trap for the unwary; and one may suppose not unreasonably that they are seldom contemplated by contracting parties. When would parties to an agreement insist on its being joint as opposed to joint and several? To secure the benefit of the joinder requirement? This is highly un-

mistake. See, e.g., Pickersgill v. Lahens, 15 Wall. (82 U.S.) 140 (1873); Barnes v. Brown, 130 N.Y. 372, 29 N.E. 760 (1892).

133 See numerous cases cited in note, 67 A.L.R. 608 at 620-625 (1930). *Contra,* Susong v. Vaiden, 10 S.C. 247 (1878).

134 See note 139 infra.

135 See generally 2 WILLISTON, CONTRACTS, rev. ed., c. 13 (1936); WILLIAMS, JOINT OBLIGATIONS, c. 5-7 (1949).

likely, because it imposes a meaningless burden—and sometimes considerable expense—upon the obligee in the event of suit, and yet does not compel him to obtain satisfaction out of more than one. To insure the rendering of a joint judgment? The question has already been answered. Since the real question is execution, the technical form of the judgment has virtually no importance to the obligee in this context, and the obligors' positions are not materially affected, because of the contribution rules. To provide that the obligation shall devolve upon surviving obligors? It is doubtful. In every situation except where the deceased obligor's estate is solvent while that of the survivor is insolvent, the rule alters the economic facts of the situation not in the least, so that there would be utterly no reason to contract for the "benefits" of the survivorship rule. To suggest that the parties are contemplating the exceptional case stated is to assume certain devious purposes that typically are not present in the market place; indeed such a result could hardly be intended mutually.

The most interesting phenomenon from the point of view of our present concern is the emergence of the joinder requirement as a characteristic of no legitimate consequence. As noted, required joinder of co-obligors currently has no effect on the economic outcome of litigation except to put the obligee to the expense of joining the co-debtor irrespective of whether he intends to pursue that co-debtor's property for satisfaction of judgment.[136] There may have been some point to the distinction between joint and joint and several obligations in an earlier day when third party practice was virtually non-existent and one obligor might want all the assistance possible in preparing to claim contribution from his fellow debtor,[137] or to forestall application of the rule occasionally applied that where a judgment is rendered against less than all joint debtors, the cause of action is merged in the judgment and the right of contribution is lost.[138] It is difficult to imagine any other circumstance which would lead *B* to consent to become bound with *C* only if *C* were required to be sued at the same time that action was brought against *B*. If *B* were fearful that *C* might absent himself from the jurisdiction, entering into a purely joint obligation would furnish *B* no special protection, because absence from the jurisdic-

136 Joinder of a bankrupt debtor is excused. See note 101 supra.

137 For example, a co-debtor joined in the original action could not very well resist contribution on the ground that it had been inadequately defended.

138 Sundberg v. Goar, 92 Minn. 143, 99 N.W. 638 (1904); but cf. WILLIAMS, JOINT OBLIGATIONS §85 (1949).

tion excuses nonjoinder of a joint obligor. If *B* feared that *C* simply might be financially irresponsible at the time of litigation on the debt, entering into a joint and not several obligation would be of no assistance, since plaintiff could join *C* as a defendant, obtain a joint judgment, and yet pursue *B*'s property for satisfaction of the entire judgment. Clearly the obligee himself gains nothing by holding a purely joint obligation. Thus, preparation for obtaining contribution seems the only answer. It follows that the general development of third party practice makes it difficult—if not impossible—to justify the existence of a class of purely joint obligations.

In apparent recognition of this fact, most American jurisdictions have enacted statutes directing that contracts or obligations which are joint at common law be construed to be joint and several.[139] This is a "presumption" contrary to the common law presumption of a joint duty when a promise is made by two or more persons.[140] The chief purposes are to eliminate the meaningless joinder requirement, to avoid the capricious survivorship rule, and to restrict the effect of a release of one joint obligor. Where such a statute applies to a given joint obligation there will be no compulsory joinder problem, and our question is moot. But these statutes are not universal, and on occasion only create a presumption, rebuttable by the use of appropriate language.

The general rule that joint obligors are necessary but not indispensable parties may be a good one in view of the pervasive desire to terminate litigation as rapidly as justice will permit. The effect is to compel a plaintiff to dispose of the entire matter in one suit if possible, without blocking recovery in the event that joinder cannot be accomplished. However, because plaintiff, once judgment is had against the obligors, can proceed to obtain satisfaction from any obligor alone and so may be required to bring in an obligor against whom he has no intention of attempting to enforce

139 See, for example, Cal. Civ. Code (1949) §§1430, 1431, 1659, 1660; Ill. Rev. Stat. (1949) c. 76, §3; Mo. Rev. Stat. (1949) §431.110; 15 Okla. Stat. (1941) §§175, 176; and an extensive if not complete list of such statutes appears in 2 WILLISTON, CONTRACTS, rev. ed., §336 (1936). Cf. Uniform Commercial Code §3-118(e): "Unless the instrument otherwise specifies two or more persons who sign as maker, acceptor or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as 'I promise to pay.'" Cf. also La. Acts 1870 (Ex. Sess.), No. 103, §2 (Dart's Stat., §1932).

140 CLARK, CONTRACTS, 4th ed., §228 (Throckmorton, 1931); 2 WILLISTON, CONTRACTS, rev. ed., §322 (1936); U.S. Printing & Lithograph Co. v. Powers, 223 N.Y. 143 at 152, 135 N.E. 225 (1922); Shurtleff v. Udall, 97 Vt. 156, 122 A. 465 (1923). Cf. La. Civil Code (1870) §2093.

his judgment, the rule may have the effect of making debts harder and more expensive to collect—a matter of policy of which the courts seldom seem aware. Further, whatever may be said for getting the controversy among all parties to the agreement settled in one suit applies as well to cases involving joint and several promises. It is fully as desirable to minimize litigation there as here. And on the important issue of trial convenience, there usually is good reason to try all the claims in one case. Quite generally, however, it is conceded that there is no compulsory joinder of "separate" claims,[141] rendering improbable early application of the required joinder rule to joint and several obligors. So long as that is true, the comparison reverses to suggest that there is no good reason why there should be compulsory joinder of joint obligors if not of joint and several obligors. Any distinction between the two must rest ultimately on the difference in intent of the parties in the two situations; and the circumstance must be rare in which the parties would deliberately contract for incidents of a purely joint liability.

2. *Joint obligees.* Where the discussion of joint obligors involves multiple defendants, problems of compulsory joinder of joint obligees center upon multiple plaintiffs. The question is this: where an obligation is owed by defendant to *B* and *C*, under what circumstances must *B* and *C* appear together to prosecute their claim? Here, too, the question traditionally has been answered by reference to the nature of the obligation or right held by the obligees.[142] If the rights of *B* and *C* were several, joinder was not even permitted at common law,[143] though, of course, joinder is now generally allowed. Joint and several rights were said not to exist,[144] but even if recognition be given to such rights[145] no joinder problems are presented since on general principles the existence of the several rights eliminates any possibility of required joinder. As with suits by joint obligors, statutes mak-

141 Cf. Blume, "Required Joinder of Claims," 45 MICH. L. REV. 797 (1947).

142 "The fundamental principle is that an action ex contractu must be joint or several according as the promise upon which it is founded is joint or several." 39 AM. JUR., Parties §30. "[I]t is only necessary to apply the rule that the remedy must follow the contract. As the one was joint, so must the other be." Marys v. Anderson, 24 Pa. St. 272 at 276 (1855).

143 Oliver v. Alexander, 6 Pet. (31 U.S.) 143 at 146 (1832); Curtis v. Sprague, 51 Cal. 239 (1876); Governor v. Webb, 12 Ga. 189 (1852).

144 Slingsby's Case, 5 Co. Rep. 18b, 77 Eng. Rep. 77 (1588); Eveleth v. Sawyer, 96 Me. 227, 52 A. 639 (1902); 17 C.J.S., Contracts §355 (b).

145 Montague Mfg. Co. v. Homes Corp., 142 Va. 301, 128 S.E. 447 (1925); Collyer v. Cook, 28 Ind. App. 272, 62 N.E. 655 (1902); CONTRACTS RESTATEMENT §§111, 128 (1932). See La. Civil Code (1870) §2088.

ing joint obligations joint and several[146] should simplify compulsory joinder problems of obligees; but this is not the likely result because of the usual judicial denial of the existence of joint and several rights. In this view it is held that the statute was not intended to apply to joint obligees—that there is not even a right of action in one joint obligee.[147] Thus the attempt to test the reality of distinctions between the terms joint and joint and several, so useful as to obligors, is not particularly relevant here.

Accordingly, it remains merely to mention the joinder principles applied to purely joint rights. Although there are said to be some theoretical distinctions between joint duties and joint rights,[148] there are striking resemblances between the characteristics of the two.

All living joint obligees must join in litigation to enforce their joint rights.[149] The common law would put it: joinder is required whenever the obligation is owed to two jointly.[150] Most modern practice statutes have incorporated the common law rule by means of a provision that all persons who are "united in interest"[151] must be joined as parties to the action.[152] Commonly, provision is made for joining as a defendant one who refuses to become a party plaintiff.[153] Technically, absence from the jurisdiction does not justify omission of an obligee.[154] This would

146 See note 139 supra.

147 See Elmer v. Copeland, (Mo. App. 1940) 141 S.W. (2d) 160, and numerous earlier Missouri cases, such as Clark v. Cable, 21 Mo. 223 (1855); Dewey v. Carey, 60 Mo. 224 (1875). Priest v. Oehler, 328 Mo. 590, 41 S.W. (2d) 783 (1931), suggests that the limitation is not effective as to suits in equity. Cf. Himes v. Schmehl, (3d Cir. 1919) 257 F. 69.

Sometimes, of course, there are separate statutory provisions made expressly applicable to obligees alone. Compare with §3-118 (e) of the Uniform Commercial Code (note 139 supra), relating to joint obligors, §3-116, as follows: "An instrument payable to the order of two or more persons (a) if in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it; (b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them."

148 See, e.g., 2 WILLISTON, CONTRACTS, rev. ed., §317 (1936).

149 Farni v. Tesson, 1 Black (66 U.S.) 309 (1861); Dewey v. Carey, 60 Mo. 224 (1875); CONTRACTS RESTATEMENT §129 (1932).

150 Sweigart v. Berk, 8 S. & R. (Pa.) 308 (1822).

151 Whatever that means. It is as nearly sterile as the terminology of joint obligations. When must two sue together? When they are united in interest. When are they united in interest? When they must sue together.

152 See POMEROY, CODE REMEDIES, 3d ed., §117 (1894); CLARK, CODE PLEADING, 2d ed., §57 (1947). The federal rule still employs the phrase, "persons having a joint interest." Rule 19 (a).

153 E.g., see Federal Rule 19 (a), which, in addition to the usual provision, indicates, unusually, that one may be made an involuntary plaintiff. See Independent Wireless Telegraph Co. v. Radio Corp. of America, 269 U.S. 459 (1926).

154 National City Bank v. Harbin Electric Joint-Stock Co., (9th Cir. 1928) 28 F. (2d) 468; McAulay v. Moody, (D.C. Ore. 1911) 185 F. 144. A contrary indication (i.e., that absence does excuse nonjoinder) in 39 AM. JUR., Parties §30, p. 893, is not supported by the cases cited; but cf. Keene v. Chambers, 271 N.Y. 326, 3 N.E. (2d) 443 (1936).

constitute a distinction between joint rights and joint duties (absence serving to excuse in the latter case)[155] were it not for the countervailing fact that a joint obligee has implied authority to sue in the name of all.[156] At common law, failure to plead nonjoinder in abatement did not waive the defect,[157] although under current systems of pleading the rule is otherwise.[158]

Upon the death of one of several joint obligees, the right of action on the obligation devolves on the survivors.[159] Thus the principle of survivorship applies to joint obligees as to joint obligors. The point was suggested above that the survivorship rule as to obligors effected no change in ultimate liabilities (except in one type of situation involving insolvency) because of the operation of the processes of contribution.[160] Is there a corresponding factor which renders survivorship as to obligees similarly meaningless, or at least only procedural in its significance? The answer: there is. It lies in the equitable principle that although the survivor is solely entitled to the "right of action" or is vested with the entire legal title to the chose in action so as to make him the only proper party to bring suit thereon, nevertheless he must account to the estate of the deceased obligee for any recoveries.

To prove the point takes a bit of doing, because there is a dearth of decisions ruling on a claim by a deceased obligee's estate. There are many decisions stating the general principle that the right of action vests in the surviving obligees,[161] and these are

155 And may have led some to the conclusion that joint obligees are "indispensable" where joint obligors are only "necessary." E.g., CARMODY, MANUAL OF NEW YORK CIVIL PRACTICE §177 (1946); 3 MOORE, FEDERAL PRACTICE, 2d ed., §19.11 (1948). There is some judicial authority for the conclusion. McAulay v. Moody, (D.C. Ore. 1911) 185 F. 144 (partners as payees of note); Dewey v. Carey, 60 Mo. 224 (1875) (joint obligees of bond). The cited passage in Carmody lists joint obligees as an example of indispensable parties. However, by way of making the point that joint *obligors* are not indispensable, Carmody cites Keene v. Chambers, 271 N.Y. 326, 3 N.E. (2d) 443 (1936), a suit for rent, which excused the absence of a nonresident *obligee* (a joint property owner).

156 Ingham Lumber Co. v. Ingersoll, 93 Ark. 447, 125 S.W. 139 (1910); Sweigart v. Berk, 8 S. & R. (Pa.) 308 (1822); CONTRACTS RESTATEMENT §§129, 130 (a). Cf. Federal Rule 19 (a).

157 Wiggin v. Cumings, 90 Mass. (8 Allen) 353 (1864); Petrie v. Bury, 3 B. & C. 353, 107 Eng. Rep. 764 (1824).

158 See the numerous cases and statutes cited in 2 WILLISTON, CONTRACTS, rev. ed., §326, notes 6-8 (1936). *Contra,* Elmer v. Copeland, (Mo. App. 1940) 141 S.W. (2d) 160; but see note 181 infra.

159 Vandenheuvel v. Storrs, 3 Conn. 203 (1819); Semper v. Coates, 93 Minn. 76, 100 N.W. 662 (1904); Hand v. Heslet, 81 Mont. 68, 261 P. 609 (1927). Cf. Hill v. Havens, 242 Iowa 920, 48 N.W. (2d) 870 (1951). Otherwise where the obligation is so personal in nature as to preclude survivorship. 2 WILLISTON, CONTRACTS, rev. ed., §344 (1936).

160 Text above at notes 129-134.

161 E.g., Knights of Honor v. Portingall, 167 Ill. 291, 47 N.E. 203 (1897) (joint beneficiaries of life insurance contract); McIntosh v. Zaring, 150 Ind. 301 at 312, 49 N.E. 164 (1898) (partners); Lannay's Lessee v. Wilson, 30 Md. 536 (1869) (joint mortgagees); Allen

sometimes generalized into the statement that the entire right or title so vests.[162] Other cases, however, seem to give support to the conclusion that only the procedural remedy devolves on the survivor. In *Vickers v. Cowell,*[163] Lord Langdale held that the personal representatives of a deceased joint mortgagee were necessary parties with the survivor to a bill for foreclosure—this because "where money was advanced by several persons jointly on a security, though the right to it survived at law, yet . . . the same rule did not prevail in equity."[164] Of this case the Supreme Court of Michigan said, "In *Vickers v. Cowell,* . . . the personal representative was held to be a necessary party, as he would, in equity, be entitled to the decedent's share of the debt, when collected. The reason given for the decision is true in point of fact. . . ."[165] An early New York case[166] contains this statement: "The right of action, in relation to all partnership demands, is transferred to the surviving partner. But he is liable to account to the representatives of the deceased partner, for his share of the partnership property."[167] Even the cases, such as those in note 161, supra, usually cited to support a broad statement of the survivorship doctrine often contain phrases which in fact warrant a narrower view—language such as "for all remedial purposes";[168] "the remedies for collection survive to the surviving payees, who may lawfully receive payment. . . . This announcement does not conclude the representatives of the deceased husband, who are not

v. Tate, 58 Miss. 585 (1881) (husband and wife as joint payees); Ehrlich v. Mulligan, 104 N.J.L. 375, 140 A. 463 (1928) (joint payees). See CONTRACTS RESTATEMENT §132 (1932).

162 2 WILLISTON, CONTRACTS, rev. ed., §344 (1936); 17 C.J.S., Contracts §353(c). Cf. 12 AM. JUR., Contracts §271. The annotation at 57 A.L.R. 600 (1928) states that "the authorities are unanimously . . . to the effect that, when one of the joint payees of a bill or note dies, title to the instrument passes to the surviving payee, to the exclusion of the representatives of the deceased."

163 1 Beav. 529, 48 Eng. Rep. 1046 (1839).

164 Id. at 531. Subsequent proceedings appear sub nom. Egremont v. Cowell, 5 Beav. 620, 49 Eng. Rep. 719 (1843); 6 Beav. 408, 49 Eng. Rep. 883 (1843). (At the last hearing, the court noted that Ann Vickers, the original plaintiff, had died in 1838, a year before the first hearing, "so that the bringing on of the cause at that time was an irregularity on the part of the solicitor, who ought to have known whether his client was living or dead, and notice of which fact must be imputed to him." 6 Beav. at 411.)

165 Martin v. McReynolds, 6 Mich. 70 at 72 (1858). The matter omitted at the end of the quotation is this: "but the consequence deduced from it does not follow." The court believed the particular result of the Vickers case improper because the purpose of the action was to enable a trustee to execute a trust. The cestui was not to be affected by the litigation and need not have been a party, therefore. The same result was reached in the Martin case. This derogates little from the force of the court's approval of the statement that the representative was entitled to the decedent's share of the debt.

166 Murray v. Mumford, 6 Cow. (N.Y.) 441 (1826).

167 Id. at 443.

168 Lannay's Lessee v. Wilson, 30 Md. 536 at 552 (1869).

parties to this suit";[169] and "immaterial to the right of recovery in this action whether the administrator of the deceased beneficiary . . . could recover from the others."[170]

An extensive discussion of the instant problem appears in *Hill v. Breeden,*[171] dealing with the rights and powers of a surviving joint obligee. In the course of its opinion, the Wyoming court said:

> "Even in jurisdictions where joint tenancies are recognized, it has been held that at times there is a duty, in equity, to account on the part of the survivor to the representative of the deceased joint obligee. Such duty to account exists, for instance, in the case of partnerships. . . . That has been held to be true also where two or more persons . . . advance money to a third person. . . . Some of these cases speak of a joint tenancy 'at law' . . . , thus keeping separate the legal and the equitable title, and not recognizing joint tenancies in equity under certain situations. Williston [Contracts (rev. ed. 1936)], § 344, states that 'survivorship also applies to joint obligees. If one of them dies, the entire *right* vests in the survivors.' The cases cited by the distinguished author (not considering those which deal with bank accounts) relate to *rights of action,* and not to the ultimate beneficial interest, or the duty to account. . . .
>
> "We need not decide whether there exists any duty to account in this case. . . . The right of action, in any event, as already shown, passes in case of a joint obligation with more than one obligee, to the survivor. All the cases seem to recognize that. We know of no cases contrary thereto. The title to the instrument exists in him for that purpose. That is not the same, or at least not necessarily the same, as saying that all the interest, legal as well as equitable, vests in him. . . . If it be suggested that it is incongruous in our day and age to separate the legal from the equitable title in cases such as this, it may be said in answer that the rule here mentioned would seem to find sufficient justification in the relative convenience which it furnishes in commercial transactions, and in the relative uniformity and certainty of the law applicable to such

169 Allen v. Tate, 58 Miss. 585 at 587-588 (1881).

170 Knights of Honor v. Portingall, 167 Ill. 291 at 292, 47 N.E. 203 (1897). Although §132 of the *Contracts Restatement* says that "On the death of a joint obligee, the surviving obligees . . . become the only joint obligees," comment *a* states that "The duty of the surviving obligee to account to the estate of a deceased obligee is not here under consideration."

171 53 Wyo. 125, 79 P. (2d) 482 (1938).

> joint obligations. As already suggested, the interests of the several joint obligees inter sese may be unequal, and there is no particular reason why a third party, the debtor, should become involved in some possible dispute between or among the joint obligees themselves."[172]

If it is true that suit by survivors alone is justifiable on the ground of convenience, especially to the debtor, there is no particular reason to seek a change in the rule. It is worth mentioning, however, that if the question of the obligees' interests as among themselves is of no concern to the debtor,[173] it is as true when all obligees are living as when some are not. Yet in the former case complete joinder is required, while in the latter it is ordinarily not even permitted.

The only other significant points at which the rule as to joint obligees is said to differ from that applied to joint obligors are discharges and releases. It has been suggested that there is a fundamental distinction between joint rights and joint duties in that joint promisees are not regarded as individually entitled to the full performance of the promise in the same way that a joint promisor is subjected to entire liability for the joint promise.[174] Yet if a debtor pays the entire debt to one joint obligee, the debt thereby is discharged,[175] apparently on theory that there is an implied agency in each joint obligee to receive payment for all.[176] Similarly, one joint obligee alone may give the debtor a release which will be binding on the others.[177]

Thus, the differences between the joinder rules as to joint (contractual) rights and joint obligations are observed to be less significant than normally supposed. And the rule as to joint obligees is relatively simple: all obligees in the jurisdiction must join in the prosecution of a claim on the obligation. On occasion

[172] Id. at 139-141.

[173] See Perry & Minor v. Perry's Exr., 98 Ky. 242 at 245, 32 S.W. 755 (1895).

[174] 2 WILLISTON, CONTRACTS, rev. ed., §317 (1936).

[175] Perry & Minor v. Perry's Exr., 98 Ky. 242 at 245, 32 S.W. 755 (1895); Dewey v. Metropolitan Life Ins. Co., 256 Mass. 281, 152 N.E. 82 (1926); Allen v. South Penn Oil Co., 72 W.Va. 155, 77 S.E. 905 (1913); Hill v. Breeden, 53 Wyo. 125, 79 P. (2d) 482 (1938).

[176] Osborne v. Martha's Vineyard R.R., 140 Mass. 549, 5 N.E. 486 (1886); CONTRACTS RESTATEMENT §130 (a) (1932). Cf. Wallace v. Kelsall, 7 M. & W. 264, 151 Eng. Rep. 765 (1840).

[177] Osborne v. Martha's Vineyard R.R., 140 Mass. 549, 5 N.E. 486 (1886); Clark v. Cable, 21 Mo. 223 at 225 (1855); Pierson & Pierson v. Hooker, 3 Johns. (N.Y.) 68 (1808). Otherwise, apparently, where a co-obligee receives only his share from the debtor and releases him only to that extent [Sweigart v. Berk, 8 S. & R. (Pa.) 308 at 311 (1822)], or where the releasor acts fraudulently or is without beneficial interest [see Rawstorne v. Gandell, 15 M. & W. 304 at 307, 153 Eng. Rep. 865 (1846)].

this procedural requirement makes litigation less convenient and more expensive than if joinder were not required. The justification for this surely is not that the obligees brought this on themselves by contract, that they simply are lying in a bed of their own making.[178]

Usually advanced as reasons for the joinder rule here applied are that it prevents a multiplicity of actions and the resulting harassment of the defendant and the court,[179] and that it prevents the splitting up of a single cause of action.[180] The latter may be dismissed as a conceptualistic statement of result rather than reason. What constitutes a single cause of action—and what, therefore, splitting—is somewhat amenable to judicial manipulation. As already mentioned, courts have held virtually indistinguishable sets of facts to give rise to one or to two causes of actions, depending in part on the degree of concern that unnecessary duplication of litigious effort impends. Flexibility of process is often desirable; it may be productive of a just and wise result. But the result must not be confused with the reason.

The other policy in the rule—that it prevents a multiplicity of actions—lies nearer the heart of the matter. The debtor having incurred what appears, at least on the surface, to be a single obligation to *B* and *C*, why should he have to respond to two actions thereon, one by *B* and one by *C*? Is it not fair and economical of everyone's time to require *B* and *C* to bring a single action jointly? The court (and, therefore, the community) benefits from the single action. The debtor likewise benefits, unless one adopts the untenable position that he ought to be permitted two chances to defeat the *B*-*C* claim. And, last, *B* and *C* are not seriously imposed upon by the present rule. If both are present in the jurisdiction, it is not unfair to compel them to proceed together in the enforcement of their claim. If one is out of the jurisdiction the others may maintain suit in the name of all, and in the event of death suit may be brought by the survivors. If a living resident obligee refuses to join as plaintiff, most codes permit him to be

178 "The acceptance of the bond, was the voluntary act of the obligees, and if people will enter into contracts which are attended with difficulties, they have no right to expect that established principles of law are to be prostrated, for their accommodation." Sweigart v. Berk, 8 S. & R. (Pa.) 308 at 311 (1822).

179 See, e.g., McAulay v. Moody, (D.C. Ore. 1911) 185 F. 144; Dewey v. Carey, 60 Mo. 224 (1875). Cf. Van Billiard v. Croft & Allen Co., 302 Pa. 349, 153 A. 555 (1931).

180 See, e.g., McAulay v. Moody, note 179 supra; Dickinson v. Tysen, 125 App. Div. 735, 110 N.Y.S. 269 (1908).

made a party defendant.[181] The rule seems workable and sensible; it promotes convenience, yet does not leave the owner of an obligation without remedy where his co-owners are unavailable or reluctant.

On the whole, the mechanical rule of required joinder works more smoothly and produces just results more consistently when applied to joint obligees than to obligors. This is so because in the case of obligees, with considerable homogeneity of fact situations, the rule is expressive of the basic principles of minimizing litigation, protecting absent persons, making adjudication possible, and the like; but the attempt, as to obligors, to formalize insubstantial distinctions between joint and joint and several obligations and to apply the rule on the basis of the distinctions has paralleled a neglect of these same basic principles. One is led to conclude that the higher quality of results in the obligee cases is fortuitous merely, produced by the reluctance to recognize joint and several rights. It seems to follow that both as to obligors and obligees compulsory joinder problems would be more wisely solved through reasoned use of the basic principles than by rote application of the rigid rules.

[*To be concluded.*]

181 Elmer v. Copeland, (Mo. App. 1940) 141 S.W. (2d) 160, cert. quashed sub nom. State ex rel. Elmer v. Hughes, 347 Mo. 237, 146 S.W. (2d) 889 (1940), reaches a result oddly at variance with this general rule. The case involved a suit on contract for attorneys' fees, Elmer and one Chitwood having been retained jointly. Chitwood refused to join as plaintiff, and Elmer joined him as defendant with the clients. Chitwood filed an answer admitting that he signed the contract but disclaiming any interest under the contract and praying to be dismissed with his costs. The court below gave judgment for plaintiff, but the intermediate appellate court reversed on the ground that plaintiff failed to show a right of action in himself. The obligation was joint, and the absence of one obligee barred suit by the other. This result is ludicrous, rendering meaningless the then statutory provision for joining as a defendant a reluctant co-obligee. Mo. Rev. Stat. (1939) §852; cf. Mo. Rev. Stat. (1949) §507.030(1). Chitwood *was* present, and it is foolish in the extreme to insist that the action is fatally defective because he is on the wrong side of the fence. It means that one joint obligee can block the other's recovery by refusing to join as a voluntary plaintiff. Said the court, with a you-made-your-bed-now-lie-in-it philosophy, "'The co-obligee cannot complain, as it was his own act to enter into a contract with another, who would have the right to control it.'" [Quoting from the leading Missouri case of Clark v. Cable, 21 Mo. 223, 225 (1855). To similar effect see the quotation from Sweigart v. Berk, note 178 supra.]

The Missouri Supreme Court granted certiorari to determine whether the appellate court's opinion was in conflict with the controlling decisions on the question. The writ was quashed and the result below left in force, but the court by way of dictum clearly recognized the unsatisfactory nature of Missouri holdings on the subject. The supreme court was concerned primarily, however, with the limited effect of the statute making joint contracts joint and several, rather than the problem of the presence of a joint obligee as a reluctant defendant. It said: ". . . if this question [whether under the statute one joint obligee may sue alone] were here on appeal we feel it would be our duty to examine it anew. . . . [S]uch a rule of law results in 'an abhorrent result.'" 347 Mo. 237 at 241-242.

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COMPULSORY JOINDER OF PARTIES IN CIVIL ACTIONS*

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III. COMPULSORY JOINDER PRINCIPLES IN ACTION, *cont'd.*

C. *In Cases Involving Interests in Real Property*

(Necessary Equals Indispensable)

COMPULSORY joinder cases involving interests in land display one peculiar and important characteristic: there is almost never any need in the state courts to wrestle with the question of whether a person is indispensable as distinguished from necessary. One hastens to add that this attribute of land cases appears to have gone largely unnoticed, but it exists none the less. It arises out of the fact that in a suit involving real property it is never impossible for the court to obtain jurisdiction over all persons interested therein to an extent which will enable the court to adjudicate controversies over these interests. Constructive service of process based on the court's power over the res within its jurisdictional confines will reach out to everyone having or claiming an interest in the res.[182]

Thus, in this field a plaintiff ordinarily cannot complain that if he is not permitted to go ahead in *A*'s absence he will be foreclosed from all relief. It may be difficult, more expensive, slower, more annoying; but it will not be impossible. "Necessary" parties are understood to be those who ought to be present if the court is to do complete justice but who nevertheless may be excused if the court is unable to obtain jurisdiction over them. Such inability

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182 Smith v. Smith, 123 Minn. 431, 144 N.W. 138 (1913). Cf. Morgan's Heirs v. Morgan, 2 Wheat. (15 U.S.) 290 at 298n. (1817); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

cannot well occur in land actions in state courts. To say that a person "ought" to be present is, virtually, to say that he *must,* since there can be no excuse of inability to cite him in.[183] Thus, if it is concluded that there may be some adverse effect on the interest of the absent person, or if for any other reason—such as preventing a duplication of litigation—it seems wise to require joinder, then joinder must (since it can) be accomplished. There can be few countervailing interests of importance in plaintiff's favor.

The same considerations would apply to cases in the federal courts[184] were it not for the fact that although a district court's process can reach an owner *qua* owner just as a state court's can, that party's presence once obtained may serve to oust the court's jurisdiction under the complete diversity rule.[185] Federal rule 19 (b) permits a court to proceed in absence of an "ought" party if his joinder would oust the court's jurisdiction; the rule is otherwise if the party is deemed "indispensable." Accordingly, so long as the present federal categories of parties are used, there is need for consideration of the distinctions between them even in property cases.[186]

Professor J. W. Moore, referring principally to federal cases, suggests that two considerations determine what parties must be before the court in property cases: (1) what type of legal interest in the property is asserted, and (2) what type of relief is sought.[187] Although the latter matter is completely consonant with the thesis here urged, the former leads again to the employment of barren concepts which are definable only in terms of themselves. The hazards of this kind of analysis in property cases and the advantages of the method of balancing equities and convenience may be suggested by the following examination of some typical problems.

It is a general rule that one tenant in common may maintain ejectment against a trespasser.[188] The tenant is entitled to posses-

183 There are instances, relatively few, in which the question may still arise. These involve, chiefly, the timeliness of defendant's objection and the number of those not joined.

184 See 11 Stat. 272 (1858), as amended, 28 U.S.C. (1952) §1655.

185 And of which more will be said later. See section III-D infra.

186 See, e.g., Fouke v. Schenewerk, (5th Cir. 1952) 197 F. (2d) 234.

187 3 MOORE, FEDERAL PRACTICE, 2d ed., 2158 (1948).

188 Most v. Passman, 21 Cal. App. (2d) 729, 70 P. (2d) 271 (1937); Carlson v. McNeill, 114 Colo. 78, 162 P. (2d) 226 (1945); Madrid v. Borrego, 54 N.M. 276, 221 P. (2d) 1058 (1950); Locklear v. Oxendine, 233 N.C. 710, 65 S.E. (2d) 673 (1951); Winborne v. Elizabeth City Lumber Co., 130 N.C. 32, 40 S.E. 825 (1902). See McComb v. McCormack, (5th Cir. 1947) 159 F. (2d) 219 at 224. Indeed, at one time, joinder was not even permitted. See Sevenson v. Cofferin, 20 N.H. 150 at 151 (1849), where the court said: "By the common law there were certain serious embarrassments which would have attended the joinder of tenants in common in real actions. Although their possession was joint, their estates and

sion of the whole, except as against a cotenant, and thus he recovers only that to which he is entitled.[189] This recovery of possession inures to the benefit of his cotenants.[190]

On the other hand, joinder of all the tenants is often required in an action for damages, as in trespass or waste.[191] The distinction between this rule and the result in ejectment cases is unsatisfactorily explained by reference to property law concepts that although each tenant in common is entitled to possession of the whole,[192] there is no such unity in monetary damages which may

titles might have been wholly different; and as these were in many cases required to be stated, and might have been traversed or avoided by plea, it is easy to perceive that numerous issues might have been joined in a single action, to some of which some of the parties to the suit might have been strangers, and yet bound to maintain them under pain of failing in the action. [But query.] This afforded sufficient ground for the rule which not only permitted but required tenants in common to sever in such actions."

189 Cook v. Spivey, (Tex. Civ. App. 1943) 174 S.W. (2d) 634. For reasons which involve the origin of ejectment, some of the older cases regarded title as the main thing to be considered and so limited plaintiff's recovery to his interest in the property. See notes, Extent of recovery in ejectment by tenants in common against stranger, 6 L.R.A. (n.s) 712 (1907), 51 L.R.A. (n.s.) 50 (1914).

190 Winborne v. Elizabeth City Lumber Co., 130 N.C. 32, 40 S.E. 825 (1902); Hanley v. Stewart, 155 Pa. Super. 535, 39 A. (2d) 323 (1944).

191 Guth v. Texas Co., (7th Cir. 1946) 155 F. (2d) 563; Holder v. Elmwood Corp., 231 Ala. 411, 165 S. 235 (1936); Bullock v. Hayward, 10 Allen (92 Mass.) 460 (1865); De Puy v. Strong, 37 N.Y. 372 (1867). Cf. Eckerson v. Haverstraw, 6 App. Div. 102, 39 N.Y.S. 635 (1896), affd. 162 N.Y. 652, 57 N.E. 1109 (1900); Slocum v. State, 177 Misc. 114, 29 N.Y.S. (2d) 993 (1941); Haught v. Continental Oil Co., 192 Okla. 345, 136 P. (2d) 691 (1943); Marys v. Anderson, 24 Pa. St. 272 (1855). See Louisville, N.A. & C. Ry. v. Hart, 119 Ind. 273 at 283, 21 N.E. 753 (1889); and see 14 AM. JUR., Cotenancy §98. This rule, based on a purpose to avoid multiplicity of suits for damages, is by no means universal. A few courts permit one tenant not only to recover possession for all but also to collect damages representing the entire injury to the common property, impressing the fund with a trust to the extent of the interests of the other tenants. Fleming v. Katahdin Pulp & Paper Co., 93 Me. 110, 44 A. 378 (1899); Lee v. Follensby, 86 Vt. 401, 85 A. 915 (1913). Cf. Young v. Garrett, (8th Cir. 1945) 149 F. (2d) 223; Carlson v. McNeill, 114 Colo. 78, 162 P. (2d) 226 (1945); Frederick v. Great Northern Ry., 207 Wis. 234, 240 N.W. 387 (1932) (joint tenants). Still other courts have not required joinder but have denied to the plaintiff any recovery beyond his own damage, leaving defendant open to additional suits by the other co-owners. Jefferson Lumber Co. v. Berry, 247 Ala. 164, 23 S. (2d) 7 (1945); Kitchens v. Jefferson County, 85 Ga. App. 902, 70 S.E. (2d) 527 (1952); Winborne v. Elizabeth City Lumber Co., 130 N.C. 32, 40 S.E. 825 (1902); Kelly v. Rainelle Coal Co., 135 W.Va. 594, 64 S.E. (2d) 606 (1951). Sometimes a cotenant is permitted to recover his own share even though had defendant objected at the proper time to the absence of plaintiff's fellow tenants joinder might have been required. See, e.g., Eastin v. Joyce, 85 Mo. App. 433 (1900); Winters v. McGhee, 3 Sneed (35 Tenn.) 128 (1855); Power v. Breckenridge, (Tex. Civ. App. 1927) 290 S.W. 872. In fact, this last is probably what is meant when, in these cases, a court says joinder is "required": The cotenant is not indispensable, but merely required if timely objection is made and, in federal courts, if jurisdiction will not be ousted. Slocum v. State, 177 Misc. 114, 29 N.Y.S. (2d) 993 (1941); Young v. Garrett, (8th Cir. 1945) 149 F. (2d) 223. Cf. MacFarland v. State, 177 Misc. 117, 29 N.Y.S. (2d) 996 (1941) (joint tenants); Baughman v. Hower, 56 Ohio App. 162, 10 N.E. (2d) 176 (1937). See note, 24 TEX. L. REV. 511 (1946).

192 Thompson v. Mawhinney & Smith, 17 Ala. 362 (1850); Metcalfe v. Miller, 96 Mich. 459, 56 N.W. 16 (1893); Taylor v. Millard, 118 N.Y. 244, 23 N.E. 376 (1890). This same

be recovered. Thus in an ejectment case the defendant (assuming him not to be a cotenant) may not be heard to urge that plaintiff alone is not entitled to that which he seeks, simply because as a matter of substantive law plaintiff is entitled to possession of the whole as against the trespasser. Not so, in most jurisdictions, as to the suit for damages.

Is there, as to these problems, an essential difference between a recovery of possession and a recovery of damages? A unity of possession supports ejectment by one cotenant alone. Injury to that possessory right gives rise to damages which would appear to be susceptible to the same unity—at least, so far as is necessary to determine the right of one cotenant to recover them in full from a trespasser. These damages he will have to share with his fellow tenant, of course; but so must he share possession with him.

Two considerations only may be thought to support the usual distinction. First, it may be suggested that to permit one cotenant to receive all the money damages is unwise because of the possibility that he will be financially unable, or unavailable, to respond to his cotenant's demand for a portion of the proceeds. If the facts in the individual case indicate this possibility, then it should be weighed by the court; but it is scarce adequate reason for a rule denying all suits for damages by a single tenant. Further, plaintiff's interest in the real property will often constitute satisfactory security for the absent tenant's share of the damages.

Second, as a matter of substantive law, the interests of tenants in common are largely separate. Their only unity is that of possession.[193] To give one tenant the power to litigate a controversy relating to his cotenant's interest may be to place more power in him than is intended or is wise.[194]

This is not to argue that more and more cotenants sue alone, for damages as well as for possession. Because it is well to adjudicate all phases of a controversy in one law suit, to bind all persons interested, and to avoid repeated harassment of defendant, a joinder of all cotenants wherever feasible is to be urged. And it is a major theme of this passage that in real property cases in state

unity, plus those of interest, title, and time, characterize joint tenancies. Wilkins v. Young, 144 Ind. 1, 41 N.E. 68 (1895). See Equitable Life Assurance Soc. v. Weightman, 61 Okla. 106 at 109, 160 P. 629 (1916).

193 People ex rel. Shaklee v. Milan, 89 Colo. 556, 5 P. (2d) 249 (1931); Madison v. Larmon, 170 Ill. 65, 48 N.E. 556 (1897).

194 See Kirby Lumber Corp. v. Southern Lumber Co., 145 Tex. 151, 196 S.W. (2d) 387 (1946).

courts such joinder is always possible and usually feasible. But if joinder is not effected and nonjoinder becomes an issue, the decision should not hinge upon a supposed difference between possessory and damage actions, else there are likely to be either "unjust" determinations or laborious attempts by the courts to avoid the effects of a rigid, pseudo-distinction.

A case in point is *Holder v. Elmwood Corporation*,[195] wherein a mother and her children owned a cemetery lot as tenants in common. Defendant was responsible for the burial of a stranger[196] in the lot, and plaintiff—one of the daughters—brought an action in trespass to realty. On the issue of whether joinder of the other tenants in common was required, the court held that although the general rule is that in trespass to realty all tenants in common must join, the rule has its exceptions. One such exception, here applicable, is that where the action is directed toward the recovery of consequential damages (such as damages for mental suffering resulting from a trespass committed under circumstances of insult or contumely),[197] a tenant thus injured may sue alone.[198] A concurring judge, sensing the issue a trifle better, suggested that in reality the *Holder* case is a situation in which trespass on the case would lie, and that no joinder would be required there. But unfortunately he maintained that if this were really an action in trespass to realty, there would be no authority for proceeding without the other cotenants.

The result reached by the court seems wise. It is a case in which, although formally for trespass to realty, the principal issue relates not to the usual trespass questions of where title is or whether there has in fact been a trespass (which apparently is conceded). Instead the controversy centers about the amount of damage personal to plaintiff. If an award for injury to plaintiff's feelings is to be made, there is little reason to require the presence of her brothers and her sisters and her cousins and her aunts. When separate plaintiffs have no factual issue of substance in common there can be little support for compulsory joinder of those plaintiffs. The instant case is one in which the wisdom of even

[195] 231 Ala. 411, 165 S. 235 (1936).

[196] Cf. KESSELRING, ARSENIC AND OLD LACE, Act II, where Abby Brewster says: "That man's an imposter! And if he came here to be buried in our cellar he's mistaken. . . . We've always wanted to hold a double funeral, but I will not read services over a total stranger."

[197] That such damages may be recovered in an action in Alabama for the trespass to realty, see Mattingly v. Houston, 167 Ala. 167, 52 S. 78 (1909).

[198] Cf. Finley v. Atlantic Transport Co., 220 N.Y. 249, 115 N.E. 715 (1917).

permissible joinder is not self-evident; a fortiori, there should be no compulsion to join.

Both opinions give implied recognition to these factors. But to reach this appropriate result the majority opinion deals in exceptions to the joinder rule in trespass to realty cases, while the concurring judge, unwilling to see the integrity of the trespass rule impaired, reasons that this is essentially an action in case, where joinder is not required. This kind of manipulation of labels to rationalize conclusions supportable upon far more reasonable and practical grounds is not designed to evoke much confidence in the method. This situation differs from that in the ordinary case of trespass to realty, where the issues are the fact of the trespass and the amount of the damage to the realty. In such case there is every reason to require the whole matter to be litigated in one suit—whether by joining all co-owners or by permitting one owner to maintain a representative action. The issues are the same as to all owners, with the unimportant exception of possible quantitative differences in their interests in the land. In *Holder,* however, there is scarcely a single advantage in compelling joinder, and had the court based its decision on a consideration of the advantages and disadvantages, the conveniences and inconveniences, the equities and inequities of the alternative possibilities, there would have been no need for the irrelevant and merely confusing discussion of whether this was trespass or case or some exception to one of them.

How should these problems be handled? Two Texas decisions provide good illustrations of how non-conceptual, practical considerations may be brought to bear in reaching sensible results in these cases. In one,[199] the plaintiff, suing in trespass to try title, had assigned a portion of the claim to her attorney, one Tucker, but he did not join with her as party plaintiff. Joinder obviously was possible, and the court required it, stating that under Texas law Tucker was a necessary (but not an indispensable) party. After holding that he must become a party under the rule that persons having "joint interests" must be brought in if subject to the court's jurisdiction,[200] the court said:

> "There is another reason why Tucker was a necessary party in order to enable the court to grant complete relief as between the parties already before the Court. About the

[199] Brown v. Meyers, (Tex. Civ. App. 1942) 163 S.W. (2d) 886.

[200] To the extent that this principle is the controlling consideration in the court's determination, the opinion leaves much to be desired.

> only relief, generally speaking, that a defendant has by law against a plaintiff for asserting a claim against him which is found upon trial to be ill-founded, is the right to recover the court costs thereby incurred. Such right . . . is the complete relief the law allows a defendant against a plaintiff for the annoyance and expense of defending against the plaintiff's claim. Since Tucker was a joint owner with plaintiff of the claim she was asserting against defendants, such defendants were entitled to have him made a plaintiff of record so that, in case defendants prevailed, they could have judgment against him for the costs they were put to in defending against the claim."[201]

In its logical extreme this would require the joinder as plaintiff of every party who stood to benefit from the judgment sought, simply to stand as security for costs in the event that defendant prevailed, and it is doubtful that many courts would go so far. The case serves, however, to illustrate the manner in which relatively minor factors can be thrown onto the balance to see whether in a given situation a court should proceed in the absence of interested persons. The particular inquiry is sensible in cases like the instant one to help decide whether joinder, clearly possible, ought to be required. If joinder is impossible and absence unavoidable, then surely no court would refuse to go ahead simply because defendant could not hold the absent party liable for costs in the event that plaintiff's claim proves ill-founded.[202]

The second case, *Hicks v. Southwestern Settlement & Development Corporation*,[203] is a yet more forceful illustration of the advantages of a flexible, practical approach to the joinder problem. Therein, 104 tenants in common, as heirs of Tom Collier, brought an action of trespass to try title — the Texas equivalent of ejectment[204] — and for damages, including damages for withdrawal and appropriation of oil and gas. Defendants alleged the existence of 574[205] other heirs of Tom Collier, and pleaded their nonjoinder in abatement. The trial court sustained the plea in abatement and, on plaintiffs' refusal to amend, dismissed the suit.

201 163 S.W. (2d) 886 at 889.

202 Indeed, as suggested in the text above, the Texas court held that the attorney "was not a necessary party in order for a valid judgment to have been entered." Ibid.

203 (Tex. Civ. App. 1945) 188 S.W. (2d) 915.

204 Cage Bros. v. Whiteman, 139 Tex. 522, 163 S.W. (2d) 638 (1942).

205 Although the figure 574 is used generally in the opinion, at two places the court refers to the 512 heirs listed in the first amended plea and the 63 additional heirs in the second amended plea. 188 S.W. (2d) 886 at 927, 928.

Plaintiffs appealed. The appellate court reversed, holding that these 104 plaintiffs might proceed alone.

The court noted the well settled rule that trespass to try title (ejectment) can be brought by one tenant in common against one having no title. Thus, there was no serious question on this phase of the case.

The real controversy related to the prayer for damages. On this point, the court stated that the rule is equally well settled that a defendant in a damage action for injury to property has a right to require that all tenants in common be made parties to the suit. He must file his objection in limine,[206] but defendants did that here. The purpose of the joinder requirement, the court observed, is to avoid multiplicity of suits against defendant.[207] The court stated that since in a suit for damages all tenants in common should join, the rule is not different simply because damages are sought as incident[208] to a possessory action, in which joinder of the others is not required.

Nevertheless, as mentioned, the 104 were permitted to proceed in the absence of the other 574. To reach this result, the court found it desirable first to characterize briefly the nature of the interests of plaintiffs and the absent tenants:

> "... [I]t is apparent that the rights of the various tenants in common to recover damages for injury to the property owned in common are technically several as distinguished from joint; that each tenant in common is only entitled to the possession of his own share of the damages; that the presence of all tenants in common is not indispensable to the rendition of judgment for damages in favor of one or less than all; and that the determination of the plaintiff's proportionate share of the damages and the adjudgment thereof to him despite the absence of his tenant in common constitutes relief which can be granted, and which, in fact, seems to have been regarded by our courts as if it were as normal and customary a form of relief as the very right of a defendant to insist upon joinder."[209]

However, after this concession to tradition, the court turned to a painstaking examination of the circumstances of this litiga-

206 Else his only protection is his right to require apportionment of damages, so that plaintiff recovers only his share. See note 191 supra; 188 S.W. (2d) 915 at 920.

207 May v. Slade, 24 Tex. 205 (1859). Cf. Taylor v. Catalon, 140 Tex. 38, 166 S.W. (2d) 102 (1942).

208 Plaintiffs sought relief in excess of three quarters of a million dollars—a rather substantial "incident."

209 188 S.W. (2d) 915 at 921.

tion to see whether the factors supporting plaintiffs' claim to go it alone outweighed defendants' claim to have their liabilities settled in one lawsuit. And it found no lack of authority for its power so to inquire. From Story's *Equity Pleadings,* for example, this quotation:

> "All these exceptions [to rules requiring joinder of persons materially interested in subject matter] will be found to be governed by one and the same principle, which is, that, as the object of the general rule is to accomplish the purposes of justice between all the parties in interest, and it is a rule founded, in some sort, upon public convenience and policy, rather than upon positive principles of municipal or general jurisprudence, courts of equity will not suffer it to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons, who are not parties, or if the circumstances of the case render the application of the rule wholly impracticable."[210]

One of the exceptions referred to by Story is for parties so numerous that it is impracticable to join them. Although the statement is normally made in the context of class actions, "we believe the rule can be applied, and ought to be applied, as an independent exception where no effective relief can be granted in a class suit to persons who are not before the court in the ordinary and usual sense as named parties."[211]

Then the court examined with some care the facts relating to the tenants in common mentioned in the plea in abatement.

> "The petition names 104 plaintiffs, of whom perhaps 17 are formal parties. Plaintiffs include residents of fifteen counties in Texas and two parishes in Louisiana; two come from Michigan, and one from Puerto Rico. The pleas in abatement now list 574 additional heirs of Tom Collier and tenants in common of appellants who are described as necessary parties to this suit. It is with more than casual interest that we have searched for some evidence or some statement to the effect that these were all of such heirs, but we have not found such evidence or such a statement in the record. It seems of direct significance to the application of the exceptions noted [relating to nonjoinder of interested parties] that

[210] Section 77 (10th ed., 1892).

[211] 188 S.W. (2d) 915 at 927; Hess v. Webb, 103 Tex. 46, 123 S.W. 111 (1909). Cf. Bailey v. Morgan, 13 Tex. 342 (1855); Smith v. Peeler, (Tex. Com. App. 1930) 29 S.W. (2d) 975.

appellees amended their pleas in abatement twice; that their first amended pleas in abatement listed 512 such heirs and that 63 additional heirs[212] were named in the second amended pleas, on which the trial court acted. It now appears that five persons who were named in said first amended pleas are dead; that three persons named in said pleas are now described as married women, and that mistakes in the names of several individuals have been discovered and corrected. . . . [A]mong the 63 additional heirs are residents of four additional states, namely, of two counties in New Mexico, one county in Arizona, two counties in Georgia, and one county in Florida. These 63 persons also include residents of three additional parishes in Louisiana and nine additional counties in Texas. Among these 63, one unknown person, a formal party, is referred to; no addresses are given for two persons; and eight minors are listed, without reference to guardianship. Although we have no information respecting the status and residence of the 512 heirs listed in the first amended plea, we feel safe in assuming that they are as diversely scattered about the United States and are of as varied a status as are the 63 additional persons named in the second amended pleas."[213]

After this recital, the court simply held that the action might proceed without joining the absent tenants in common, on the grounds that every issue raised by the pleadings could be determined between the parties in the absence of the omitted tenants and without injury to their interests, and that

"The injury which may result to [defendants] from a multiplicity of suits on the causes of action before us is more than counterbalanced by the injury which might result to appellants if the exception noted was not applied, for otherwise [plaintiffs] . . . might be denied the right to maintain their action. . . . [U]pon considering the great number of plaintiffs already in this suit, and the diverse status and residences of said plaintiffs, we have reached the conclusion that it would be impracticable . . . to require the joinder of any appreciable number or percentage of the persons listed in the pleas in abatement. . . ."[214]

Here exemplified is the very approach suggested throughout these materials. *This* is the way to do it! Recognition is given to the

212 See note 205 supra.
213 188 S.W. (2d) 915 at 927-928.
214 Id. at 928, 930.

pressing need to conclude the controversy as neatly and expeditiously as possible. Defendants must be protected from repetitive litigation, if possible. But the countervailing factor is the tremendous difficulty, if not impossibility, of obtaining the presence of all interested — numbering in the hundreds. The court's opinion, which is long, contains some discussion of the nature of the rights involved. The court does conclude that the rights of the tenants in common, although technically several,[215] are joint within the meaning of the rule [216] that persons having a joint interest shall be made parties,[217] and that all else being equal there is much force in defendants' position that the suit should be abated unless all are joined. But all else is not equal; indeed, the force of the difficulty argument outweighs, and plaintiffs are permitted to proceed without their fellow tenants.[218]

One may dissent from the court's conclusion on the ground that substituted service would suffice to confer jurisdiction to settle the whole controversy. But the important thing to note is the court's *method.* One knows exactly what considerations produced the decision. There is no camouflage, no hiding behind slippery, conceptual terms meaning one thing this time and another the next. The court states the practical factors which moved it to this result. This is the method which ought always to be employed.

What of determinations of the respective interests of co-owners among themselves, as in partition, for example? The purpose of judicial partition is to determine the interests of the co-owners and to sever and divide the property among them.[219] No clairvoyance is needed to sense that courts seldom, if ever, will dispense with a co-owner in a partition suit. If tenant in common *A* is absent from a partition suit, any determination of the interests of the other co-owners will be imperfect. It will not be binding on *A*.[220] Title to the property will be difficult to market. If a co-

215 See text at note 209 supra.

216 Texas Rules of Civil Procedure 39 (a) (similar to Federal Rules of Civil Procedure 19[a]).

217 188 S.W. (2d) 915 at 926.

218 Cf. Choctaw and Chickasaw Nations v. Seitz, (10th Cir. 1951) 193 F. (2d) 456, an action to establish title and recover possession, where the court proceeded without the United States (which refused to be joined and would not, therefore, be bound) even though this left defendants with cloud on their title and subject to another suit. The court held that the uncertainty of defendants' position was nothing new and was outweighed by the inability of plaintiff nations to obtain any adjudication otherwise.

219 See 40 AM. JUR., Partition §§2, 4, 27.

220 If support is needed for this near-axiomatic statement, see Butler v. Roys, 25 Mich. 53 (1872).

owner nevertheless succeeds in selling an imperfectly partitioned share, he and his buyer may have some renegotiating to do when *A* appears, attacks the partition, and gets it set aside.[221] The presence of all parties in interest in the partition action is clearly indicated, and this is the standard pronouncement on the question: All persons having or claiming any interest in the land in suit are necessary parties.[222] As suggested earlier, it never will be impossible for a state court to obtain jurisdiction over all co-owners, known and unknown, domestic and foreign; the presence of the land in the jurisdiction furnishes a basis for constructive service of process, and with no relief sought other than determination and severance of respective interests in the land (and, possibly, distribution of the proceeds of a judicial sale) the court clearly has the requisite power over all owners to enter a decree.[223] Therefore, joinder will be required.

The rule in the federal courts is much the same,[224] except when joinder of all co-owners would destroy complete diversity of citizenship and, typically, the foundation of jurisdiction. If co-owners are merely necessary, jurisdiction-destroying joinder may be dispensed with; if indispensable, then the federal court should not proceed.[225] Which is the case?

Although it seems amiss, as argued repeatedly herein, to conclude that a federal court is without *power* to issue a partial decree among those owners present (having dispensed with joinder of diversity-destroying owners), the practical value of the decree and the effects of the court's action normally would be so slight that expenditure of the court's effort in this direction would be unwarranted. This complies, substantially, with one of the tests of indispensability in *Shields v. Barrow*: the controversy would be left "in such a condition that its final determination may be

221 Ibid.

222 Henry Quellmalz Lumber & Mfg. Co. v. Roche, 145 Ark. 38, 223 S.W. 376 (1920); Gates v. Salmon, 35 Cal. 576 (1868); Butler v. Roys, 25 Mich. 53 (1872); Wilson v. Wilson, 166 Miss. 369, 146 S. 855 (1933); Johnson v. Johnson, 170 Mo. 34, 70 S.W. 241 (1902); Toole v. Toole, 112 N.Y. 333, 19 N.E. 682 (1889). Cf. Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 S. 722 (1904); Haggerty v. Wagner, 148 Ind. 625, 48 N.E. 366 (1897); Young v. Meyers, 124 Ohio St. 448, 179 N.E. 358 (1931). But cf. Bank of California v. Superior Court, 16 Cal. (2d) 516, 106 P. (2d) 879 (1940).

223 Toole v. Toole, 112 N.Y. 333, 19 N.E. 682 (1889). See Fouke v. Schenewerk, (5th Cir. 1952) 197 F. (2d) 234 at 236; Arizona Lead Mines v. Sullivan Mining Co., (D.C. Idaho 1943) 3 F.R.D. 135 at 138.

224 Barney v. Baltimore, 6 Wall. (73 U.S.) 280 (1867); Torrence v. Shedd, 144 U.S. 527 (1892). Sec. 1655 of Tit. 28 of the United States Code (1952) continues the venerable provision for substituted service in actions to enforce a claim to property within the district. That this applies to partition actions, see Greeley v. Lowe, 155 U.S. 58 (1894).

225 Federal Rules of Civil Procedure 19 (a), (b).

wholly inconsistent with equity and good conscience."[226] *A* would not be bound, and the interests of those made parties still would be subject to *A*'s claims. Title would be highly unmarketable. The whole situation would be tentative and uncertain, to say the least. In the absence of the most compelling of countervailing considerations, the court should refuse to proceed. Is any such consideration possible here?

One can conceive of but two circumstances which might be forwarded as sufficiently important to overcome the court's reluctance to proceed. The first, unavailability of another forum, may be disposed of easily. Plaintiff clearly has a remedy in the state court, and the federal court should take cognizance of that plain fact.[227] Diversity jurisdiction is a luxury here, not a necessity.

The second, closely related, involves the suggestion that because of local prejudice a fair trial cannot be had in the state forum. In other words, although there is another court where plaintiff may have his claim adjudicated, the alternative to remaining in federal court is heavily weighted against plaintiff. To the extent that venue change within the state is available and efficacious, the suggestion has no merit in this context. If, however, diversity jurisdiction is demonstrably needed to accomplish here what apparently was its original purpose — to provide a neutral forum for citizens of different states — then conceivably the federal court might consent to proceed without *A*. But this is rather academic, because it is hard to imagine a partition case in which incomplete relief in a federal court would be superior to the complete relief available in a state court. In other terms, the practical objections to partitioning land among less than all co-owners are so strong that it is almost inconceivable that there could exist countervailing prejudices sufficient to cause a federal court to proceed nevertheless.

Thus it seems valid to characterize co-owners as indispensable parties to judicial partitions, not conceptually but factually.

226 17 How. (58 U.S.) 130 at 139 (1854). At least, Justice Miller so indicated in the majority opinion in Barney v. Baltimore, 6 Wall. (73 U.S.) 280 at 285 (1867): "This language aptly describes the character of the interest of the Ridgelys, in the land of which partition is sought in this suit. . . . If, for instance, the decree should partition the land and state an account, the particular pieces of land allotted to the parties before the court, would still be undivided as to *these* parties, whose interest in each piece would remain as before the partition. And they could at any time apply to the proper court, and ask a repartition of the whole tract, unaffected by the decree in this case, because they can be bound by no decree to which they are not parties."

227 Fouke v. Schenewerk, (5th Cir. 1952) 197 F. (2d) 234.

Although the existence of undivided joint interests in land presents the best argument for required joinder of the owners in actions having to do with that land, there are other types of (common) interest which give rise to joinder questions. One of these arises out of the lessor-lessee relationship, not in terms of litigation inter sese but in suits by or against one without the other. When should a lessee be joined in an action by or against his lessor? When should a lessor be joined in his lessee's action?

To remain for the moment on the subject of partition, it is interesting to note the holdings on the necessity of joining lessees of co-owners. Some courts — apparently most — hold that since the interest of a lessee will not be affected by the partition, the existence of the lease is no bar to partition among reversioners or remaindermen[228] and the lessee is not a necessary party to the action.[229] A few courts, however, hold the lessee necessary,[230] while still others indicate — largely on statutory grounds — that the lease is a bar to the maintenance of the action.[231]

If in fact a lessee's interest will not be affected by partition, the conclusion that he need not be joined can scarce be gainsaid. Upon what ground, then, is a lessee ever held necessary? In a dictum in *Thruston v. Minke,*[232] the Maryland court said that the lessee should be joined so that he "may be required to join the lessor in the deed of severance."[233] Surely this is but a formality. Failure to join could not qualify the partition. The fee is subject to an outstanding lease. This lease cannot be diminished by the partition, absent special circumstances; neither does the lease render the severance of the various reversionary or remainder interests the less effective.

228 Willard v. Willard, 145 U.S. 116 (1892); Finch v. Smith, 146 Ala. 644, 41 S. 819 (1906); Blakeslee v. Blakeslee, 265 Ill. 48, 106 N.E. 470 (1914). Cf. Erwin v. Hines, 190 Okla. 99, 121 P. (2d) 612 (1942).

229 Fyffe v. Fyffe, 292 Ill. App. 539, 11 N.E. (2d) 857 (1937); Bethel College v. Gladdish, 204 Ky. 10, 263 S.W. 659 (1924); Thruston v. Minke, 32 Md. 571 (1870); Peterman v. Kingsley, 140 Wis. 666, 123 N.W. 137 (1909). Cf. Gailey v. Ricketts, 123 Ark. 18, 184 S.W. 422 (1916).

230 Glaser v. Burns, 154 N.Y.S. 21 (1915), affd. 170 App. Div. 321, 155 N.Y.S. 936 (1915); Cornish v. Gest, 2 Cox Eq. Cas. 27, 30 Eng. Rep. 13 (1821). See Thruston v. Minke, 32 Md. 571 at 575 (1870).

231 Hunnewell v. Taylor, 6 Cush. (60 Mass.) 472 (1850); Sullivan v. Sullivan, 66 N.Y. 37 (1876) (partition now might be unfair by the end of the lease). See Henderson v. Henderson, 136 Iowa 564 at 568, 114 N.W. 178 (1907). The statutes provide that partition is available only to owners of estates in possession.

232 32 Md. 571 (1870).

233 Id. at 575. The court held this consideration inapplicable in the instant case for the reason, inter alia, that there was not to be a severance but rather a judicial sale with distribution of the proceeds.

In an English equity case, the court noted that the tenant therein had an interest approximating a freehold, "a very material interest which must [sic] be affected by this decree."[234] In fact, the tenant had a 99-year lease determinable on lives — a once common way of establishing a life tenancy without some of its technical disadvantages. Although conceivably it may be sensible to include as a party one who will have the possessory interest for a potentially long term, the brief opinion does not suggest how the interest *must* be affected by the sought partition, and it thus is difficult to support the conclusion that the lessee is necessary. Incidentally, one American court distinguishes between a tenant for a long term (necessary) and a tenant from year to year (not even proper!).[235]

In general, the necessity of joining a tenant in partition cases is determined on the usual test of whether his interest will be affected by the partition. Normally it will not. A few courts say it will and hold the tenant necessary; none holds him "indispensable."

A sampling of injunction cases with respect to activity on leased land supports further the conclusion that the important test is whether the action by or against a lessor only, or a lessee only, so affects the interest of the other that any litigation ought to be undertaken or defended by them together. Thus the Iowa Supreme Court held[236] that in an action against an oil company to have operation of the company's filling station abated as a nuisance, the lessee-operator was an "indispensable" party under the rule that

> "A party is indispensable if his interest is not severable, and his absence will prevent the Court from rendering any judgment between the parties before it; or if nothwithstanding his absence his interest would necessarily be inequitably affected by a judgment rendered between those before the court."[237]

The operator was a lessee and not an employee, and it would seem evident that any injunction granted by the court ought to run against him also and not merely the lessor, particularly if it prescribes conditions relating to the mode of operation.[238] Be-

234 Cornish v. Gest, 2 Cox Eq. Cas. 27, 30 Eng. Rep. 13 (1821).
235 Thruston v. Minke again. See notes 229 ff.
236 Wright v. Standard Oil Co., 234 Iowa 1241, 15 N.W. (2d) 275 (1944).
237 Iowa Rules of Civil Procedure 25 (b).
238 Cf. Interstate Commerce Commission v. Blue Diamond Products Co., (8th Cir. 1951) 192 F. (2d) 43.

cause an injunction would render his lease of less (perhaps no) value, he should have opportunity to be heard in opposition. It is probable that he was within the jurisdiction and subject to the court's process. There was strong reason to require his joinder and apparently none to excuse it. No fault can be found with the result.

Unfortunate, however, are the Iowa rule and the court's use of it in characterizing the lessee as indispensable. As to the rule's first clause, severability of interest very nearly begs the question in every case. In the instant case it was of no help; the court did not suggest that there was a non-severable interest. The inquiry suggested in the second clause into whether a decree would necessarily affect the absent party inequitably points in the right direction, although taken alone it is yet short of adequate. But, good or bad, it does not clearly apply to this case. The rule labels as indispensable a party who would "necessarily be inequitably affected." A determination (clearly possible) that operation of the station did not constitute a nuisance would not affect the lessee inequitably (adversely); therefore, he is not *necessarily* so affected. The mere possibility of an adverse holding may suffice, in context, to require joinder. But alone it does not deprive the court, either by the rule or on general principle, of power to proceed without the lessee if there is a legitimate reason why he cannot be joined. Enjoining the lessor alone might serve to abate the nuisance. For many purposes, a filling station lessee is little more than an employee,[239] the lease being drafted to give the lessor company as much employer control as possible without abandoning the lease status; and on occasion the company may be treated as employer despite the terminology of the agreement.[240] Under such circumstance, action against the lessor alone might serve as a satisfactory, better-than-nothing remedy. There is nothing basic missing from the ability of the court to proceed in that fashion.

To be compared with the filling station case is *Ambassador Petroleum Company v. Superior Court*.[241] The state of California sought under statute to enjoin some forty-two operators (lessees) in an oil field from committing unreasonable waste of natural gas. In the cited action the operators made application for a writ of prohibition to restrain the proceedings until the lessors of the

239 See note, 1 OKLA. L. REV. 277 (1948).

240 See, e.g., Greene v. Spinning, (Mo. App. 1931) 48 S.W. (2d) 51; Eason Oil Co. v. Runyan, 158 Okla. 241, 13 P. (2d) 118 (1932).

241 208 Cal. 667, 284 P. 445 (1930).

land be joined, for the asserted reason that the lessors' royalties on production would be affected.[242] Although suggesting by way of dictum that a different rule would apply in purely private disputes, the court held that the lessors were not indispensable even though they would be "bound" by the ruling.

The court apparently was faced with a situation in which the large number and diverse locations of owners of the property made it difficult to find them or impracticable to bring them all in. The purpose of the original action was to conserve natural resources in the public interest, and that could be done most effectively by enjoining certain activities of the defendant operators. Although the question of illegal operation could be determined between the state and the operators, the consequence of reducing royalty payments to owners certainly justified joining the owners, and would even suggest that their presence be required if feasible. (Indeed, the California court in a later decision[243] referred to the *Ambassador Petroleum* case as one involving "necessary" as distinguished from "indispensable" parties — that is, parties whose joinder would be required if possible, but whose excusable absence would not prevent an adjudication by the court.)

The court noted the state's argument that "the interests of both lessors and lessees in defeating the pending action are identical in so far as said action may result in a diminution of production and . . . the petitioners [lessees] are therefore the representatives of their lessors in defending said action,"[244] and indicated its agreement, saying: "Certain it is that the interests of the parties so claimed to be represented and the interests of those before the court are not antagonistic. The interests of the numerous lessors . . . are so inseparably bound up and identical with the interests of the lessees in the subject matter of the action that both might well be deemed in the same class in the pending litigation.[245]

Yet for aught that appears in the opinion, the interests of the absent lessors may lie with the state almost as easily as with the lessors. The court does not indicate that there has been any factual inquiry into the question of what the lessors — any of them — want. It seems simply to assume that because an injunction

242 The degree of defendants' solicitude for the welfare of absent parties, both here and generally, is remarkably related to its usefulness as a defense in the pending action.

243 Bank of California v. Superior Court, 16 Cal. (2d) 516, 106 P. (2d) 879 (1940).

244 208 Cal. 667 at 675.

245 Ibid.

will reduce production and, therefore, royalties, the lessors oppose the injunction as do the lessees. It is possible, however, that inquiry would disclose that high production (and royalties) now would result in a much shorter well life, with consequent less total return from the well. An operator's natural desire for quick recovery of his drilling costs, with which to drill again, may lead in quite the opposite direction from the lessor's desire for the greatest return from his royalty interest, even if it be spread out over a longer period of time. The facts related by the court are insufficient to provide a basis for judgment as to which result would be adverse to any of the lessors. In this respect the opinion appears faulty; one cannot tell whether the court made a proper determination or not. But the result reached is supportable notwithstanding, because the public interest, as defined by the statute providing for this kind of action, furnished the court ground for going ahead in the teeth of the conceded possibility that the absent owners would be, in fact, adversely affected.

The court did not stumble over concepts of inseparability of rights or over lack of power to determine the legal position of absent parties. Instead, it appears to have weighed the importance of protecting the public interest, as expressed in the conservation law, against the importance of protecting the interests of absent owners, and to have found that the former overbalanced the latter. Whatever possibility there was of bringing in the absentee owners by constructive service of process was apparently overcome by the impracticability of citing in so large a number.[246] The court's method here is commendable. Although there was the possibility that absent persons would be adversely affected factually — and this usually serves to bar consideration of the case — that possibility was outweighed by the need for gas conservation. When the court stated that a different result might obtain in purely private disputes, that simply was recognition that in the absence of the public interest in conservation there would

246 The court appropriately could have inquired whether any steps had been taken to notify the owners of the pendency of the action, enabling any of them desiring to do so to enter the action as a litigant. Mortgage Guarantee Co. v. Atlantic City Jewish Community Center, 14 N.J. Misc. 1, 181 A. 700 (1935), affd. 121 N.J. Eq. 110, 187 A. 372 (1936).

Reference to the large number of owners immediately suggests the possibility of a representative suit, and the court offhandedly mentions that because the interests of the operators and of the owners are "so inseparably bound up and identical" with each other, "No violence would therefore be done to the doctrine of representation to hold that in defending said action the petitioners are representing their lessors." 208 Cal. 667 at 675. With the language in context, however, the court seems not to hold that there was virtual representation of the owners; rather, it holds that the injunction action may proceed without the owners.

be no compelling reason for proceeding without the owners. It is not to say that the court's power is diminished or its discretion shackled.

Lawsuits directed toward invalidating a deed or lease are usually but not universally[247] subjected to the requirement that there be joined not only all parties to the instrument[248] (a common holding in contract rescission cases[249]) but also all persons whose interests in the land may be adversely affected by the litigation.[250]

Failure to join all parties to a lease and to a deed in an action to cancel and to rescind was held "fundamental error," which can be raised in the appellate court for the first time, even without assignment of error.[251] The court spoke in the same case of the party defect as depriving it of "authority" to pass on the merits of the controversy or to decide any question which might affect the rights of the absent parties. Lessors who are tenants in common all must be before the court in a suit in which they seek to cancel a lease.[252] But a Kansas case indicated that if tenants in common convey by separate instruments, joinder not only may not be required, it may not even be permitted—this in the face of the fact that all conveyances run to a single person in consequence of a single fraudulent scheme.[253] Fortunately, liberalized rules and interpretations would permit such joinder in nearly all jurisdic-

247 As exceptions to the general rule, see, e.g., Gandy v. Fortner, 119 Ala. 303, 24 S. 425 (1898); Corwin v. Tillman, 255 Ill. App. 230 (1929); Stevens v. Thompson, 98 Mich. 9, 56 N.W. 1041 (1893).

248 Baten v. Nona-Fletcher Mineral Co., (5th Cir. 1952) 198 F. (2d) 629; Lake v. Dowd, 207 Cal. 290, 277 P. 1047 (1929); Henson v. Federal Land Bank, 162 Ga. 839, 134 S.E. 923 (1926); Brinker v. Haydon, 3 Dana (33 Ky.) 156 (1835); Dose v. Dose, 172 Minn. 145, 214 N.W. 769 (1927).

249 Trimble v. John C. Winston Co., (5th Cir. 1932) 56 F. (2d) 150, cert. den. 286 U.S. 555 (1932); Commonwealth Trust Co. v. Smith, (9th Cir. 1921) 273 F. 1, affd. 266 U.S. 152 (1924); Spanner v. Brandt, (S.D. N.Y. 1941) 1 F.R.D. 555. Cf. Board of Railroad Commrs. v. Reed, 102 Mont. 382, 58 P. (2d) 271 (1936). See 3 BLACK, RESCISSION AND CANCELLATION, 2d ed., §657 (1929). But cf. New England Mutual Life Ins. Co. v. Brandenburg, (S.D. N.Y. 1948) 8 F.R.D. 151.

250 Calcote v. Texas Pacific Coal & Oil Co., (5th Cir. 1946) 157 F. (2d) 216, cert. den. 329 U.S. 782 (1946); Mitau v. Roddan, 149 Cal. 1, 84 P. 145 (1906); Young v. Young, 157 Wis. 424, 147 N.W. 361 (1914). Cf. Warfield v. Marks, (5th Cir. 1951) 190 F. (2d) 178; Sigal v. Hartford Nat. Bank & Trust Co., 119 Conn. 570, 177 A. 742 (1935).

251 Dial v. Martin, (Tex. Civ. App. 1928) 8 S.W. (2d) 241; a subsequent reversal, on other grounds, is not pertinent here.

252 Kentucky Natural Gas Corp. v. Duggins, (6th Cir. 1948) 165 F. (2d) 1011. The court distinguished the case from suits in ejectment, in which tenants in common need not join. ". . . a tenant in common in such an action is seeking to recover his aliquot portion of the land involved, and each tenant in common has a similar separate right. The rule does not apply when tenants in common seek to cancel or rescind a lease of oil and gas. In such an action it is the rule that all the tenants in common must unite on account of the contract involved being an entire and indivisible one." P. 1016. The problem is deemed to possess more contract characteristics than property peculiarities.

253 Jeffers v. Forbes, 28 Kan. 174 (1882).

tions today; but there is little reason to believe that the issue of compulsory joinder would be decided differently.

In *Cunningham v. Brewer*,[254] the Nebraska court held that both Mr. and Mrs. Cunningham were "indispensable" parties to a suit to rescind for fraud a deed of their homestead to Brewer. Under state law they were joint tenants with right of survivorship, and the court stated that a final decree canceling the deed could not be entered without materially affecting both of them. Although the statement is true literally, it would be quite possible for the appellate court to reach a result (as did the trial court) which would not *adversely* affect the absent husband: a judgment for plaintiff-wife. As an Illinois court said in a similar case, "The decree on the prayer asked for took nothing from [him], but, on the contrary, the cancellation of the deed thereunder would restore whatever rights [he] had lost."[255] Were the issue being raised for the first time in the trial court, the perhaps equal possibility of a judgment for defendant would indeed justify a court in refusing to proceed until Mr. Cunningham was brought in, else the whole proceeding might ultimately prove to have been in vain. Mr. Cunningham apparently was available; indeed the trial court had denied as untimely his motion to intervene after trial. But the fact is that the issue of his nonjoinder was being raised for the first time in the appellate court. The result was to remand the case to the trial court with direction to make him a party. For all that appears, when the trial court and the appellate court look at the case next time they may order rescission, thus having rendered of no particular importance the husband's absence in the first case. Already having the record before it, it seems wasteful for the appellate court to remand the case without first determining—probably with some ease—whether it would be inclined to rule in favor of defendant. If it would be so disposed, then it ought to remand, so that Mr. Cunningham could be heard.[256] If, however, a judgment for plaintiff (Mrs. Cunningham) appeared warranted, the presence of the husband would add nothing; on balance, the judgment

254 144 Neb. 211, 16 N.W. (2d) 533 (1944).

255 Corwin v. Tillman, 255 Ill. App. 230 at 235 (1929).

256 This assumes that Mr. Cunningham's interest is aligned with his wife's and will be served as hers is served. Actually, it appears that Mr. Brewer, knowing of Mrs. Cunningham's "physical and mental weakness," paid Mr. Cunningham, illiterate and a habitual drunkard, $150 to persuade his wife to join him in the deed to Brewer. Presumably Mr. Cunningham is not now a friend of Mr. Brewer's, but his true position in the controversy is not made clear. As mentioned in the text above, Mr. Cunningham attempted to intervene after trial, but his petition was denied for reasons not stated.

would affect him beneficially—not adversely—and no second suit would ensue.

In *Sigal v. Hartford National Bank & Trust Company*[257] the Connecticut court proceeded to an affirmance of a trial court ruling that an agreement was valid, even though there were absent several individuals having a "direct interest" whose "rights would be adversely affected" if the agreement were held invalid. Said the court:

> "But the question at issue has been ably and thoroughly presented to us; in our opinion the agreement is clearly valid; a decision to this effect will give the persons who are mentioned in it all they could claim; and any right of the estate would depend upon facts not appearing upon the present record and which may or may not exist. We shall therefore decide the case, even though, of course, our decision would not be conclusive upon the rights of persons not parties to the action."[258]

Put it this way: A valid reason for a trial court's refusal to proceed when one possible outcome of a case will affect an absent party adversely is that so long as that potentiality exists, there is a strong possibility that the court and the parties will have had their time employed in a completely vain pursuit, which must be gone through again in the presence of a party absent the first time. If the absent one is available he ought by all means to be brought in. That makes sense. But *Cunningham v. Brewer* stands at the other end of the trail. The case has already been tried and the result in the trial court was a victory for Mrs. Cunningham: rescission. Since Mr. Cunningham's interest presumably is aligned with that of his wife's, he is not yet harmed. When the appellate court, without looking at the merits, sends the case back for a new trial with the husband present, it does not assure that there will be no waste of judicial energy.[259] Instead, it seems to produce the prospect of even more potentially vain effort than has already been expended—that is, in the event of a victory for plaintiffs in a subsequent trial and appeal. How much better it would be for the Nebraska court to follow the example of the *Sigal* case:[260] to examine the record and, if it finds support for the decree below and no adverse effect upon the husband, to affirm; plaintiff's case presumably would become no weaker upon the addition of her

257 119 Conn. 570, 177 A. 742 (1935).
258 Id. at 573.
259 Except as this case may be a warning to subsequent litigants.
260 Note 257 supra.

husband. If, on the other hand, a reversal on the merits is warranted, a new trial is in order, because judgment for defendant might accomplish little by way of a complete disposition of the controversy: Mr. Cunningham may well bring a suit of his own, thus putting defendant improperly to the trouble of resisting two suits and imposing unnecessarily on the courts.

Two or more separate agreements concerning the same property may nevertheless be so related that an action directed to but one may involve the parties to the others to such an extent that their joinder is at least an "ought" and perhaps a "must." This is particularly well exemplified in cases involving petroleum bearing land. In a suit for forfeiture of an oil and gas lease for the sublessee's breach of an implied covenant to protect from drainage, both the lessee and the sublessee "should" be made parties.[261] This is so even though acts constituting grounds for forfeiture of the parent lease may be committed by a sublessee alone. The principal lessee's interest is affected, and although there is no fatal objection to proceeding in absence of the lessee if he proves unavailable, when he is available the court is amply justified in holding that he should be brought in.[262] In *Veal v. Thomason*[263] the Texas Supreme Court was concerned with the claimed invalidity of an oil and gas lease which reserved title in the lessors to one-eighth of the oil but provided that the lessors in similar leases in the unitized block should participate in the royalties from oil, gas, or other minerals, "if, when and as produced and sold." The court of civil appeals had ruled[264] that the lessors held absolute title until the oil was sold, and that the rights of the various other lessors in the unitized block as regards the royalty earned by any particular leased tract in the block did not accrue until the owner of the tract had reduced the royalty to money. It followed that the claim against such an owner in favor of the other lessors was merely a money demand, not to be classed as an interest in the land from which the royalty was derived. Hence, said the lower court in a trespass to try title action wherein the lease was claimed to be invalid, the other lessors in the unitized tract were not "necessary" parties. However, the supreme court, reversing, held that since a single transaction or purpose was consummated, the unitization

261 Hartman Ranch Co. v. Associated Oil Co., 10 Cal. (2d) 232, 73 P. (2d) 1163 (1937) and cases therein cited.

262 Cf. Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 284 P. 445 (1930).

263 138 Tex. 341, 159 S.W. (2d) 472 (1942).

264 144 S.W. (2d) 361 (1940).

contract was single even though the leases were separate.[265] The lessors were joint owners or tenants of all royalties reserved in each of the several leases in the unitized block, the ownership being proportionate. Thus, the other lessors or royalty holders were necessary parties. Said the court, if not joined and the judgment here were to free this land from the lease, the royalty owners under the other leases in the unitized block will have had their royalty interest in this land cut off and destroyed, for all practical purposes, without their having had a day in court. Without more facts than appear in the two *Veal* opinions, the decision of the supreme court is appropriate enough. Its method plainly is superior to that of the lower court, which attached controlling importance to distinctions between interests in money and interests in land. Instead, the higher court looked realistically into the question of the factual effect on the other parties to the unitization agreement of a possible finding of invalidity of the lease, and it concluded that their interests—however they may be characterized—might indeed be adversely affected. In this view the result seems supportable, although it is difficult to see that joinder of the other parties would have much effect on the outcome of the case; i.e., it would be surprising if they could provide much assistance in a trial on the issue of the validity of the agreement between one lessor and his lessee. But the possible effect on the others and the inter-relationships inherent in the unitization agreement suggest the need for an opportunity for them to be heard, and the court so held.

To compare with the preceding cases the decision in *McArthur v. Rosenbaum Co.*[266] is to observe again the clear need for deciding required joinder cases one by one on particular facts. Plaintiff lessee brought action in federal court against defendant lessor for a declaratory judgment construing a renewal clause in the lease. Plaintiff had erected a single building on four tracts, only one of which was owned by the lessor. Each tract was leased under virtually identical agreements. As required, plaintiff had erected his twelve story building in such way as to make possible its division into four units, with dividing walls on tract lines. Lessors under the other leases were not here joined, and the joinder would have destroyed diversity jurisdiction. The Third Circuit held that

[265] But cf. Jeffers v. Forbes, 28 Kan. 174 (1882). In Hudson v. Newell, (5th Cir. 1949) 174 F. (2d) 546, plaintiffs' disclaimer of an intent to interfere with unitizations formed before the filing of this action led the court to dispense with joinder of otherwise indispensable parties to the earlier unitizations.

[266] (3d Cir. 1950) 180 F. (2d) 617.

joinder was not required, that the other lessors were not indispensable parties because (a) the interests of these lessors would not be "directly affected legally by the adjudication," and (b) failure to join would not be inconsistent with equity and good conscience.

Discussing the latter point, the court noted that although the other lessors were undoubtedly interested in the result of this case, the possibility of loss of this tenant had been before them for the life of the lease, many years, and the provision for dividing walls would leave them with separate buildings erected at the tenant's cost. "If anyone will suffer an inequity it would appear to be the lessee. . . . But this is its own fault. . . ."[267] Actually, it would seem that the second of the court's two reasons for dispensing with joinder of the other lessees could be rephrased so that the two would read: (a) the interests of the lessors would not be directly affected legally by the adjudication, and (b) the interests of the lessors would not be directly affected factually by the adjudication.[268] And the first of these, as insisted elsewhere herein,[269] is empty of meaning, since nothing the court can do will *legally* affect the interest of an absent person, in the res judicata sense.

The result's clear dependence on the particular facts, i.e., the "separability" of the portions of the building, is emphasized by the court's pains to distinguish the instant case from the decision in *Metropolis Theatre Co. v. Barkhausen*,[270] where on otherwise comparable facts indispensability was the rule because the twenty-two story building involved housed a theater which could not reasonably be divided by walls along the lot lines.

It does not surprise that the courts respond to joinder questions in deed reformation cases in about the same pattern as in suits for rescission and cancellation. That is to say, they demand joinder of all parties to the original transaction,[271] holding even that a judgment of reformation absent the grantor is "fatally defective," subject to collateral attack.[272] Yet here too a court can draw from circumstance justification for excusing nonjoinder of a party to the deed, as where objection is untimely[273] or the deed-party has

267 Id. at 622.

268 The attempt is to rephrase in almost the court's own language. Were further departure considered, the word "directly" should be replaced by "adversely."

269 Text at notes 46-47 supra.

270 (7th Cir. 1948) 170 F. (2d) 481.

271 Ford v. Glens Falls Indemnity Co., (E.D. S.C. 1948) 80 F. Supp. 347; Eureka Co. v. Henney Motor Co., (D.C. Del. 1933) 4 F. Supp. 564; Kegel v. McCormack, 225 Wis. 19, 272 N.W. 650 (1937). Cf. Skurski v. Gurski, 329 Mich. 474, 45 N.W. (2d) 359 (1951).

272 Fox v. Faulkner, 222 Ky. 584, 1 S.W. (2d) 1079 (1927).

273 Flowers v. Germann, 211 Minn. 412, 1 N.W. (2d) 424 (1941).

virtually estopped himself by conceding that the deed contains error.[274]

Thus, in a Minnesota case[275] the defendants in an ejectment action asked for reformation of the deeds by which they and plaintiffs obtained title to their lands from common grantors. The trial court denied reformation and gave judgment for plaintiffs. Not until the case was on appeal did plaintiffs, as appellees, raise the issue of nonjoinder of the grantors, and the court held that the objection came too late unless, without the grantors, no decree whatever could be made determining the principal issues in the case. Admitting that a decree in the instant case would not " 'completely settle all the questions which may be involved in the controversy' so as to 'conclude the rights of all the persons who have any interest in the subject-matter of the litigation,' "[276] the court concluded nevertheless that a substantial, meaningful decree could be made without injuring absent persons and that therefore the grantors were not required to be present in order for the court to consider the case, especially since plaintiff did not raise the nonjoinder question by demurrer or answer in the trial court. It is true that if plaintiffs lose, as they seem destined to do, they may bring an action against the grantors for breach of warranties in the deed—though the facts indicate little chance of success. That is one more factor to be cast onto the scale in favor of requiring joinder; but it does not indicate a lack of power in the court to enter a final judgment without the grantors since the purpose of the action can be accomplished in their absence.[277]

274 Welch v. Johnson, 93 Ore. 591, 183 P. 776 (1919).

275 Flowers v. Germann, 211 Minn. 412, 1 N.W. (2d) 424 (1941).

276 Id. at 420. These phrases are derived from a leading Minnesota case, Tatum v. Roberts, 59 Minn. 52, 60 N.W. 848 (1894), which attempts to define kinds of parties in equity actions. The definitions make "necessary" parties roughly equivalent to the federal category of "indispensable" parties, and "proper" about the same as "necessary."

Necessary parties "are those without whom no decree at all can be effectively made determining the principal issues in the cause." 59 Minn. 52 at 56; these words in turn are taken from POMEROY, REMEDIES AND REMEDIAL RIGHTS, 2d ed., §329 (1883). Proper parties "are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject matter of the litigation." Ibid. Except that the labels are not those usually employed and understood by lawyers, these definitions are good. All is common sense and there is no confusion about a lack of power in either definition. Rather, the concern is whether a decree as to those before the court will be effective as to the main issues in the case. With these as tools a court could, if it would, work well.

277 Unfortunately, to an otherwise laudable decision a confusing element is added by the appellate court's disposition of the case. After holding that the grantors are not "necessary" (meaning "indispensable") parties, and that there must be a reversal on the merits, i.e., reformation should be decreed, it states that the reversal is without prejudice to the

Relevant, though not directly in point, is a Georgia reformation case[278] where a real estate agent had inserted the description of several lots in a blank deed signed by plaintiff so as to convey not only the intended property but several other lots also, including two owned by plaintiff's wife. The wife's presence in the suit was held not essential.[279] Although it would be "better practice" to have made her a party, she would be benefited by a decree of reformation, not prejudicially affected, and accordingly joinder would not be required. This proper concern over the position of the absent wife is allayed upon the express assumption that if plaintiff wins, the wife is affected favorably, not adversely, and upon the tacit assumption that if plaintiff loses, the wife still may bring a suit of her own against defendant. All is well as to the wife. The tacit assumption, however, poses the problem of a double burden upon defendant, who, after a successful defense of the first action, may be summoned to battle again. Where there is a strong possibility that a defendant may be put to two suits it seems improper for a court to proceed in the absence of an interested person merely because the absent one cannot conceivably be hurt. A plaintiff in state cases will not be remediless if joinder is required, and therefore the value inherent in minimizing litigation and protecting defendants from repetitious suit may have full play. If the court is clearly of the opinion that on the merits decision is to go for plaintiff, then all of this may become surplusage; but the court should say so: "We find that plaintiff's claim is meritorious. In that view nonjoinder of plaintiff's wife becomes inconsequential." Instead, the implication of the court's language is that *if* plaintiff succeeds, the wife will not be hurt and accordingly joinder will not be required. So long as the matter is an "iffy" one, the court ought specifically to recognize that if defendant wins instead, the absent wife is not hurt (having an unimpaired claim of her own) but by the same token the defendant may be prejudiced. The decisional process then would turn into one of an

right of the trial court to hear and consider a motion to join the grantors. "Upon that court initially rests the burden of determining who should be joined as parties." 211 Minn. 412 at 422. Thus, after holding expressly that the grantors were not "necessary" parties, the appellate court suggests that the trial court have a whack at the question. Although the facts indicate that the presence of the grantors would not detract from the force of defendants' apparent right to reformation, the appellate court, by its disposition of the case, seems dangerously near contradicting its expressions of opinion on the party question.

278 Parnell v. Wooten, 202 Ga. 443, 43 S.E. (2d) 673 (1947).

279 The holding is somewhat less than square. A general demurrer having been sustained by the trial court, an amendment to bring in the missing wife was held inappropriate.

evaluation of interests, with the nod probably going to defendant, it being possible in all state and many federal cases for plaintiff to join the wife.

Under a Texas statute, joinder of spouses is required in reformation pleas involving community property. A case[280] in that state held that a pro forma joinder of the husband satisfies the requirement, the court saying:

> "The test to be applied in determining whether or not there was a sufficient joinder of all necessary parties plaintiff is whether the judgment, if it had been favorable to the defendant, would have protected the defendant under a plea of res judicata against a subsequent suit involving the same subject matter. If H. E. Flannery and his wife were sufficiently before the court that they would have been barred from maintaining a second suit involving the same subject matter against the defendant, then the defendant has no right to complain of the lack of necessary parties; otherwise he has such right."[281]

This articulate concern lest defendant be subjected to two claims is what is lacking in the Georgia case.

Compulsory joinder questions in real estate mortgage foreclosures are subject to essentially the same type of analysis as those in other actions involving land.

The mortgagee's primary objective in foreclosing usually is to obtain payment of the defaulted obligation out of the security. To accomplish this, he asks the court to terminate the equities of redemption of all persons having an interest in the mortgaged property, that title to the property as it stood before the mortgage may be vested in a purchaser at judicial sale. The mortgagee wants to achieve a sale of all the right and title that his mortgage covers, and the buyer wants to know with some certainty what title it is that he buys. Only thus can a maximum price be obtained. It becomes clear that there is good reason to require the presence of all persons who may have an outstanding interest in or claim against the property.[282] These persons are sometimes termed "necessary,"

[280] Wade v. Wade, 140 Tex. 339, 167 S.W. (2d) 1008 (1943).

[281] Id. at 342.

[282] "It is manifestly unjust to all persons interested in the proceeds of the sale of the mortgaged premises that the sale be made subject to an outstanding right to redeem, for that invariably and inevitably prejudices the sale." Gould v. Wheeler, 28 N.J. Eq. 541 at 542 (1877) (ordering a subsequent mortgagee joined). "[T]he owner of any quantity or quality of estate in the premises, even in the remotest degree or of the most trifling value, becomes as necessary a party defendant to perfect the title as the sole owner of the entire equity of redemption." WILTSIE, MORTGAGE FORECLOSURE, 5th ed., §330 (1939). Said one

in the sense that their joinder as defendants is necessary to the full accomplishment of the purpose of the foreclosure action.[283]

From here it is simple to go on to a list of types of individuals who are "necessary" in this sense:[284] e.g., the mortgagor,[285] purchasers from the mortgagor,[286] heirs or devisees of the mortgagor,[287] junior mortgagees,[288] subsequent lessees of the mortgagor.[289] The

court with reference to the necessity of joining the mortgagor (pledgor) in a suit to foreclose a pledge of stock: "It is the duty of the security holder to exhaust the security before he can obtain a deficiency judgment against the indorser or maker. . . . The security holder cannot reasonably exhaust the security if at the foreclosure sale no one would buy it, because no one could get a title which would be worth paying 10 cents for [, for] the simple reason that the owner's interest would not be foreclosed." Hoyt v. Upper Marion Ditch Co., 94 Utah 134 at 147, 76 P. (2d) 234 (1938). See 37 AM. JUR., Mortgages §548. Cf. O'Brien v. Moffitt, 133 Ind. 660, 33 N.E. 616 (1892); Webb v. Patterson, 114 Neb. 346 at 351, 207 N.W. 522 (1926).

283 OSBORNE, MORTGAGES §321 (1951); WILTSIE, MORTGAGE FORECLOSURE, 5th ed., §329 (1939).

284 WILTSIE, note 283 supra, lists some 51 categories of possible parties and indicates that 30 of them are or may be "necessary."

285 Goodenow v. Ewer, 16 Cal. 461 (1860); Riddick v. Davis, 220 N.C. 120, 16 S.E. (2d) 662 (1941). See Federal Land Bank v. Fjerestad, 66 S.D. 429 at 431, 285 N.W. 298 (1939).

286 Terrell v. Allison, 88 U.S. 289 (1874); Fowler v. Lilly, 122 Ind. 297, 23 N.E. 767 (1889).

287 Chew v. Hyman, (C.C. N.D. Ill. 1881) 7 F. 7; Thomas v. Barnes, 219 Ala. 652, 123 S. 18 (1929); Phillips v. Parker, 148 Kan. 474, 83 P. (2d) 709 (1938); Buff v. Schafer, 157 Minn. 485, 196 N.W. 661 (1924). Cf. Reedy v. Camfield, 159 Ill. 254, 42 N.E. 833 (1896); Fraser v. Bean, 96 N.C. 327, 2 S.E. 159 (1887). See Federal Land Bank v. Fjerestad, 66 S.D. 429 at 431, 285 N.W. 298 (1939); and see annotation, 119 A.L.R. 807 (1939). The result may be otherwise by force of applicable statute. See, e.g., McClung v. Cullison, 15 Okla. 402, 82 P. 499 (1905); Dixon v. Cuyler, 27 Ga. 248 (1859); Tryon v. Munson, 77 Pa. 250 (1874). An executor or personal representative, who does not succeed to the decedent-mortgagor's interest in the property, is not a necessary party. Woods v. First Nat. Bank, (9th Cir. 1926) 16 F. (2d) 856; Heidgerd v. Reis, 135 App. Div. 414, 199 N.Y.S. 921 (1909); Federal Land Bank v. Fjerestad, supra this note. Cf. Hinkle v. Walker, 213 N.C. 657, 197 S.E. 129 (1938). See Fraser v. Bean, supra this note at 329. Again, the rule is sometimes otherwise by statute. E.g., Okla. Stat. (1951) tit. 58, §252. See Seals v. Chadwick, 18 Del. 381, 45 A. 718 (1900). Or where plaintiff seeks a deficiency judgment against the estate. Belloc v. Rogers, 9 Cal. 124 (1858); Columbia Theological Seminary v. Arnette, 168 S.C. 272, 167 S.E. 465 (1932). In this latter instance, the estate will be directly affected, and the personal representative of the deceased mortgagor is, with reason, a necessary party.

288 Mechanics State Bank v. Kramer Service, Inc., 184 Miss. 895, 186 S. 644 (1939); Gould v. Wheeler, 28 N.J. Eq. 541 (1877). But cf. Street v. Beal and Hyatt, 16 Iowa 68 (1861); Harris v. Hooper, 50 Md. 537 (1878); Pierson v. Pierson, (Tex. Civ. App. 1939) 128 S.W. (2d) 108, revd. on other grounds, 136 Tex. 310, 150 S.W. (2d) 788 (1941) ("must be made parties or they are not affected by the foreclosure. . . . That does not mean, however, that no effective judgment of foreclosure can be had without their presence in the suit. It means only that, if the plaintiff wishes to shut off their equity of redemption, he must make them parties." [128 S.W. (2d) at 113]); Davis v. Walker, (Tex. Civ. App. 1921) 233 S.W. 521 at 523; and see Stroup v. Rutherford, (Tex. Civ. App. 1951) 238 S.W. (2d) 612 at 613.

Whether a junior mortgagee is a necessary party cannot be answered without asking, "For what purpose?" For example, if the issue arises between the mortgagor and the senior mortgagee and the foreclosure sale has already been consummated, failure to have joined the junior mortgagee is unimportant: he is not a necessary party. Spokane Savings & Loan Soc. v. Liliopoulos, 160 Wash. 71, 294 P. 561 (1930). The same issue raised before

interests of all these individuals must be terminated if the foreclosure action is to accomplish all that it ought. In fact, however, it is misleading to lump all these types of parties into this one category. In the first place the question of *required* joinder seldom arises. It normally is the desire of all who have any interest in the mortgaged property that it be sold for the highest price possible, and that can happen only if the buyer can be vested with title equal to that held by the mortgagor at the time of the mortgage. Hence, we may expect that the parties themselves will take steps to join all those whose interests are affected and who may have rights of redemption. In the second place the term "necessary," here as in other areas, is a term of various denotations.[290] There seems to be no case, for example, in which a court has had to refuse, finally, to proceed in the absence of one of these parties, for the reason that with constructive service of process available in real property cases a ruling by the court that a party is "necessary" typically leads to the immediate joinder of the missing party without further compulsion by the court.[291] In such cases, then,

the sale probably will lead to an order requiring the junior mortgagee to be joined: he is a necessary party. Gould v. Wheeler, supra this note. See Norfolk Bldg. & Loan Assn. v. Stern, 113 N.J. Eq. 385 at 387, 167 A. 32 (1933); Morris v. Wheeler, 45 N.Y. 708 at 711 (1871). See also note, 88 UNIV. PA. L. REV. 994 (1940).

Prior mortgagees ordinarily are not necessary parties in a foreclosure action by a junior mortgagee. Jerome v. McCarter, 94 U.S. 734 (1876); Cone Bros. Construction Co. v. Moore, 141 Fla. 420, 193 S. 288 (1940). See Raymond v. Holborn, 23 Wis. 57 at 63 (1868). Although there is some authority to the effect that holders of superior interests are not even proper parties (e.g., Cone Bros. Construction Co. v. Moore, supra), the weight of authority indicates that such persons may be joined. In certain circumstances it has been held that they must be joined, as where sale of the entire property and estate, and not merely the equity of redemption, is desired. This is requisite so that the amount of prior encumbrances can be fixed and paid out, and the purchaser protected. See Jerome v. McCarter, supra this note, at 735-736; San Francisco v. Lawton, 18 Cal. 465 (1861).

289 Cf. Dundee Naval Stores Co. v. McDowell, 65 Fla. 15, 61 S. 108 (1913); Metropolitan Life Ins. Co. v. Childs, 230 N.Y. 285, 130 N.E. 295 (1921); Stark v. Super-Cold Southwest Co., (Tex. Civ. App. 1951) 239 S.W. (2d) 402; Thornely v. Andrews, 40 Wash. 580, 82 P. 899 (1905). But cf. McDermott v. Burke, 16 Cal. 580 (1860); Chicago Title & Trust Co. v. Herlin, 299 Ill. App. 429, 20 N.E. (2d) 333 (1939); Dolese v. Bellows-Claude Neon Co., 261 Mich. 57, 245 N.W. 569 (1932). The result may depend on whether the state adheres to the title or lien theory of mortgages, and on whether the tenant in possession holds under the mortgagor. See comment, 17 WASH. L. REV. 37 (1942); Chicago Title & Trust Co. v. Herlin, supra this note (question raised for first time on appeal: court implied that different result should obtain in trial court); Stroup v. Rutherford, (Tex. Civ. App. 1951) 238 S.W. (2d) 612.

290 "[I]n this context as in most contexts 'necessary' means convenient. Or do you prefer to say it means very convenient or very, very convenient." DURFEE, CASES ON SECURITY 204 (1951).

291 However, see Gould v. Wheeler, 28 N.J. Eq. 541 (1877), in which a stay of the proceedings was ordered pending the joining of a subsequent mortgagee; 418 Trading Corp. v. Moon Realty Corp., 285 App. Div. 444, 137 N.Y.S. (2d) 513 (1955). Cf. Nashville & Decatur R.R. v. Orr, 85 U.S. 471 (1873).

there is no cause to determine indispensability as distinguished from necessary joinder. This is true, also, where for reasons sufficient to the parties joinder is dispensed with by consent. There can be no harm to those not joined,[292] so that a court has no cause to raise the question on its own motion.

There seem to be but two ways in which the question of indispensability arises. One, there may be an objection on appeal to the failure below to have joined the holder of a particular interest. The counter argument offered may be that the nonjoinder was not mentioned below and may not be raised for the first time on appeal. The latter argument cannot prevail if the court holds the party indispensable.[293] Two, in a later suit (a subsequent foreclosure, or a different kind of proceeding, as, for example, ejectment) the original foreclosure proceeding may be challenged as void for lack of a party.[294] The number of cases upholding such challenge is inconsiderable. The courts regularly hold that failure to join this lienholder or that claimant renders the action below ineffective as to *him*. But as emphasized repeatedly herein, that is quite a different thing from holding the action ineffective to foreclose interests which *were* represented in the original proceeding.[295]

There do appear from time to time statements to the effect that since the principal purpose of a foreclosure suit is to terminate the equity of redemption, the owner of that equity *must* be made a party.[296] This means, ordinarily, the original mortgagor; and in the simple case where he has not encumbered the property additionally or transferred all or a part of it to another person, he is spoken of as the only defendant necessary.[297] But this is hardly more than to say that if *B* wants to recover money from *A*, he must

292 I.e., their interests simply remain unaffected by the adjudication in their absence. Terrell v. Allison, 88 U.S. 289 (1874); Riddick v. Davis, 220 N.C. 120, 16 S.E. (2d) 662 (1941).

293 Thomas v. Barnes, 219 Ala. 652, 123 S. 18 (1929) (heirs of mortgagor held "indispensable" in this sense); Hambrick v. Russell, 86 Ala. 199, 5 S. 298 (1888) (mortgagee held "indispensable" in this sense in foreclosure instituted by assignee of mortgage debt); Langley v. Andrews, 132 Ala. 147, 31 S. 469 (1902) (same). Cf. Reader v. District Court, 98 Utah 1, 94 P. (2d) 858 (1939).

294 Richards v. Thompson, 43 Kan. 209, 23 P. 106 (1890); Phillips v. Parker, 148 Kan. 474, 83 P. (2d) 709 (1938).

295 This discussion emphasizes the rules in state courts. If federal jurisdiction in these matters be explored, one comes upon the diversity problem as a third instance in which the indispensability question may arise. Cf. Woods v. First National Bank, (9th Cir. 1926) 16 F. (2d) 856. See generally section III-D infra.

296 See, e.g., Riddick v. Davis, 220 N.C. 120, 16 S.E. (2d) 662 (1941); Federal Land Bank v. Fjerestad, 66 S.D. 429, 285 N.W. 298 (1939).

297 Carpenter v. Ingalls, 3 S.D. 49, 51 N.W. 948 (1892).

sue *A*. If he comes into court and says that process has not been served on *A* and that *A* is nowhere about, but that a judgment against *A* is desired, the indicated result is a dismissal. So it is that if a mortgagee wants to foreclose the mortgagor's interest in the security (and, probably, to obtain a deficiency judgment against him),[298] he must sue the mortgagor. One can think of few circumstances in which foreclosure of the interest of the mortgagor or his successor in interest is not vital to the success of a foreclosure proceeding. In this sense the mortgagor is indispensable.[299] So, in this sense, are all persons whose interests the mortgagee wants to foreclose: their interests can be cut off only if they are made parties.

However, it is conceivable that in a given instance, the mortgagee may be willing that the foreclosure sale vest in the purchaser something less than unencumbered title. The sale price will be less and the omission is not to be encouraged,[300] but there is no generally accepted principle which makes the proceeding fatally defective for failure to join any particular interest. It simply is ineffective as to those not joined but is valid as to those who were.[301] Indeed, one author suggests that since the word "necessary" is of "relative signification,"[302] there is no such thing as a "necessary" (in the sense of "indispensable," apparently) party defendant in foreclosure cases.[303]

298 Obviously, if the creditor wants a deficiency judgment against the original mortgagor who has conveyed the property to another, the mortgagor must be joined. See Johnson v. Home Owners' Loan Corp., 46 Cal. App. (2d) 546 at 548, 116 P. (2d) 167 (1941); Dennis v. Ivey, 134 Fla. 181 at 185, 183 S. 624 (1938). But cf. Vanderspeck v. Federal Land Bank, 175 Miss. 759, 167 S. 782 (1936); Methvin v. American Savings & L. Assn., 194 Okla. 288, 151 P. (2d) 370 (1944). Guarantors of the mortgage note are not necessary parties; suit against them for the balance of the note in default may be brought before foreclosure, or after a foreclosure proceeding to which the guarantors were not parties. Berea College v. Killian, 304 Ill. App. 296, 26 N.E. (2d) 650 (1940); Prevatt v. Federal Land Bank, 129 Fla. 464, 176 S. 494 (1937) (rule extends to co-makers and endorsers if they have no interest in the mortgaged property).

299 Terrell v. Allison, 88 U.S. 289 (1874).

300 See the quotation from Hoyt v. Upper Marion Ditch Co., note 282 supra.

301 "[The mortgagor's grantee] should have been made a party to the foreclosure suit. His rights could not be cut off by that proceeding, unless he was made a party thereto. But the decree was not, for that reason, a void decree. . . . The failure to make him a party . . . does not affect the validity of the decree, but simply leaves his right of redemption unimpaired. . . . Although the grantee of the mortgagor, who is not a party, is not affected, yet his interest, which remains the same, is only a right to redeem. By the foreclosure and sale and the master's deed thereunder, the legal title becomes vested in the grantee in such deed, and leaves nothing in the mortgagor, or his grantees, who are not parties to the proceeding, except the right to redeem in equity." Walker v. Warner, 179 Ill. 16 at 23-24, 53 N.E. 594 (1899). The cases in note 294 supra are the exception, not the rule.

302 I.e., its meaning must relate to the objective or purpose of the mortgagee.

303 WILTSIE, MORTGAGE FORECLOSURE, 5th ed., §329 (1939). Cf. DURFEE, CASES ON SECURITY 204 (1951).

The authorities discussed in the preceding half dozen paragraphs involve, generally, a debtor-mortgagor or parties deriving their interests through him. Much of what is there said is applicable equally to those who have creditor interests, although these latter belong in the category of parties plaintiff. If they are held necessary but refuse to associate themselves as plaintiffs, they will be brought in as defendants. Only a mortgagee or someone claiming through him can have any reason for seeking foreclosure, and usually he commences the action voluntarily. Hence, by comparison with required joinder questions as to persons holding debtor interests the number of such problems as to creditors is minute.

A suit for foreclosure is normally brought by the mortgagee or, if he has assigned his interest, by his assignee or transferee. If the mortgage is held by a single creditor and the obligation and the security interest in the mortgaged property have not been divorced, there is no joinder problem. Any issue of the propriety of his bringing the suit will relate to the question of who is the real party in interest, a (substantive law) question not within the purview of this discussion. But where two or more have an interest in the secured obligation, or where the obligation is held by one and the security title by another, it may become necessary to decide which of the creditors and title holders must be made parties.

Foreclosure, of course, assumes the existence of a secured obligation in default. Necessarily, then, the holder of the obligation must be a party to the foreclosure proceedings to establish the amount of the obligation, his ownership of it and the fact that it is in default.[304] It has been stated that where two or more have an interest in the ownership of the lien, all must be joined, as plaintiffs if willing, as defendants if not.[305] There is a substantial body of cases holding co-mortgagees to be "necessary" parties,[306]

304 Bennett v. Taylor, 5 Cal. 502 (1855); Bergen v. Urbahn, 83 N.Y. 49 (1880). "[T]he finding of the amount due, for nonpayment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed. . . ." Chicago & Vincennes R.R. v. Fosdick, 106 U.S. 47 at 71 (1882).

305 Holm v. Goodley Holding Corp., 164 Misc. 45, 295 N.Y.S. 885 (1937) (holder of a junior participating interest in a first mortgage required to bring in his assignor who was present holder of the senior participating interest). Cf. Webb v. Patterson, 114 Neb. 346, 207 N.W. 522 (1926).

306 Hopkins v. Ward, 51 Ky. 185 (1851); Blanchard v. Baldwin, 88 N.H. 423, 190 A. 285 (1937); Oppenheimer v. Schultz, 107 N.J. Eq. 192, 152 A. 323 (1930); Flemming v. Iuliano, 92 N.J. Eq. 685, 114 A. 786 (1921); Lowe v. Morgan, 1 Bro. Ch. 368, 28 Eng. Rep. 1183 (1784). Cf. Goodall v. Mopley, 45 Ind. 355 (1873). See Porter v. Clements, 3 Ark. 364 at 382 (1841); Tyler v. Yreka Water Co., 14 Cal. 212 at 219 (1859); and see WILTSIE, MORTGAGE FORECLOSURE, 5th ed., §§318, 396 (1939).

but there also are cases holding that one co-mortgagee can sue alone.[307] This serves but to demonstrate again the impropriety of labeling any one class of persons "necessary" or "indispensable" at all times and in all circumstances.[308] Instead, each case should be examined on its facts. Why is co-mortgagee *A* not joined? Will the mortgagor be harmed by his absence? Will *A* himself be harmed? In *Nashville & Decatur R.R. v. Orr*,[309] railroad bonds were secured by a mortgage which ran not to a trustee but directly to the persons holding the bonds, who were named and their several interests described. The mortgagor defaulted, and Orr, a bondholder, suing for himself and for others who might intervene and contribute to the expenses of the suit, sought to foreclose. There was substantial doubt that the security was adequate. The Supreme Court dismissed Orr's bill on the ground that with the security insufficient Orr's success likely would be prejudicial to the interests of the absent bondholders covered by the same mortgage. "Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be just occasion for it. . . . If . . . there should be a deficiency in the security, real or apprehended, every one interested should have notice in advance of the time, place, and mode of sale, that he may make timely arrangements to secure a sale of the property at its full value."[310] This is a sensible result, reached upon inquiry into facts far more pertinent than such matters as whether Orr and the other bondholders were joint tenants or tenants in common or totally separate in their interests.

The holders of the security interest in the land should be made parties in order to enable the court to vest in the foreclosure sale purchaser the entire title to the property as of the time the mortgage was given.[311] This may be true even where the titleholder never

307 Brown v. Bates, 55 Me. 520 (1868) (statute may have had an effect on the result); Thayer v. Campbell, 9 Mo. 277 (1845); Montgomerie v. Marquis of Bath, 3 Ves. Jr. 560, 30 Eng. Rep. 1155 (1797). Cf. Platt v. Squire, 53 Mass. 494 (1847). See Cochran v. Goodell, 131 Mass. 464 at 466 (1881).

308 It may be possible to explain (if not justify) the division of authority between footnotes 306 and 307 in orthodox joint-several terms: the cases in the former involved what the courts commonly call "joint" interests, whereas the co-mortgagees in the latter note's cases had "separate" interests, i.e., they were tenants in severalty or in common. But cf. WILTSIE, MORTGAGE FORECLOSURE, 5th ed., §318 (1939): "Where a mortgage is owned in severalty, it is indispensable [sic] that all the interests be represented in an action to foreclose. All co-mortgagees must be made parties."

309 85 U.S. 471 (1873).

310 Id. at 475.

311 Cf. Goodenow v. Ewer, 16 Cal. 461 at 469 (1860); Champion v. Hinkle, 45 N.J. Eq. 162 at 165, 16 A. 701 (1888).

had[312] or has divested himself of[313] an interest in the obligation which the title was given to secure.

These are the general principles. To simple cases the application is simple. In complex cases—for example, trust indenture mortgages securing corporate bonds[314]—the problems are harder but the litigation is cut to the same pattern.

It will have been apparent from all this that the purposes of foreclosure proceedings are best and most fairly effectuated by bringing before the court all persons who may have any interest in or claim to the property, whether as debtor, creditor, or otherwise. Because constructive service of process may be employed to gain jurisdiction over these interests and claims and their holders to the extent of the property itself, one would expect the courts always to insist upon joinder. This is especially true in the light of the interest of the public and of the defendant in avoiding multiple litigation and the desire to deal cleanly with property titles. Indeed there is something akin to a presumption in favor of joinder: "The courts should be particularly jealous of the integrity of judicial sales."[315] And the strong interest of the parties in wrapping up the whole matter in one package normally leads to an avoidance of any nonjoinder issue. Nevertheless there are instances in which the petitioner fails to join interested persons;[316] and in some of these the courts do not insist on joinder,[317] noting that the foreclosure action is without prejudice to the absent persons' interests. These cases run counter to the "presumption" that joinder will be required. But in each the court has concluded

312 As intimated, at least, in Chrisman v. Chenoweth, 81 Ind. 401 (1882).

313 Flagg v. Florence Discount Co., 228 Ala. 153, 153 S. 177 (1934). This applies, of course, only to title theory jurisdictions.

314 The requirement of joinder depends on the wording of the indenture. The trustee, as holder of title to the security, must be a party. See Busch v. City Trust Co., 101 Fla. 392, 134 S. 226 (1931); 37 AM. JUR., Mortgages §§545, 547. Ordinarily, the indenture precludes the bondholders from instituting foreclosure, even though they are the "real" creditors. See OSBORNE, MORTGAGES §320 (1951).

315 First Carolinas Joint Stock Land Bank v. McNiel, 177 S.C. 332 at 343, 181 S.E. 21 (1935).

316 It is quite possible, of course, that the plaintiff has a legitimate reason for omitting certain persons. See, e.g., Cody Trust Co. v. Hotel Clayton Co., 293 Ill. App. 1, 12 N.E. (2d) 32 (1937) (mortgage bondholders were not joined because they were numerous and were adequately represented by the trustee); Mortgage Guarantee Co. v. Atlantic City Jewish Community Center, 14 N.J. Misc. 1, 181 A. 700 (1935), affd. 121 N.J. Eq. 110, 187 A. 372 (1936). The local procedure for substituted service may be expensive and difficult; and of course due process must be complied with. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

317 "That [i.e., joinder of trust deed beneficiaries] they dispensed with, why should not the court? Their absence does not render the bill defective." Continental Bank & Trust Co. v. Fulton Realty Co., 10 N.J. Misc. 1105 at 1110, 162 A. 560 (1932).

from the facts that (1) there was a good reason why joinder had not been effected and (2) the action would accomplish something significant for the parties without prejudice to any person not present.[318] One does not regret the deviations from general rule, but rather recognizes that the general rule allows—indeed requires —a case-by-case determination of the factual need for joinder, and that there are situations where joinder may be excused without apology.

D. *In Cases Where Federal Jurisdiction Is Bottomed on Diversity of Citizenship*

(A Dimension Is Added)

In the main, compulsory joinder presents the same questions in the federal courts as in state courts. The considerations that move a court to one determination or another are not greatly different. Indeed the familiar formulations of required joinder rules utilized by all courts, both state and federal, derive principally from federal cases where jurisdiction was supported by diversity of citizenship,[319] and in diversity cases the question of indispensability well may be decided upon the basis of state rules. To the extent that required joinder is determined by reference to the character of the parties' rights or interests the problem is essentially substantive and must be settled by reference to the governing law—usually state,[320] under *Erie R.R. v. Tompkins*,[321] but sometimes federal, as, for example, where copyrights and patents are involved.[322] Where, however, the question of indispensability

318 Note the emphasis upon particular facts in this statement: "It is well recognized that a Court of Equity has wide discretion in determining who are necessary parties in a case of this sort. Conceding the general rule to require that a trustee be made a party for the purpose of divesting his title and removing this cloud, the situation here was exceptional. When the record disclosed that this corporate trustee was not only insolvent and had ceased to do business for many years, with such assets as it possessed being administered by a receiver, who appeared and disclaimed and renounced the right or authority to perform the functions of this trust, and that, further more, while technically a separate entity, this trustee was a subsidiary, an arm of the mortgagee bringing the suit, which owned all of the capital stock of the corporate trustee, we think the chancellor was well within the discretion and jurisdictional powers vested in him in proceeding as he did. . . . 'The modern tendency in all progressive jurisdiction is away from formal defects and distinctions, not affecting the merits.'" Lawman v. Barnett, 180 Tenn. 546 at 569-570, 177 S.W. (2d) 121 (1944). See also the cases in note 316 supra.

319 The most important of which is Shields v. Barrow, 17 How. (58 U.S.) 130 (1854).

320 Kroese v. General Castings Corp., (3d Cir. 1950) 179 F. (2d) 760, cert. den. 339 U.S. 983 (1950); Young v. Garrett, (8th Cir. 1945) 149 F. (2d) 223; Platte v. New Amsterdam Casualty Co., (D.C. Neb. 1946) 6 F.R.D. 475.

321 304 U.S. 64 (1938).

322 Stuff v. La Budde Feed & Grain Co., (E.D. Wis. 1941) 42 F. Supp. 493.

depends on whether the court can do justice to the parties in court without injuring the rights of absent persons, the problem is said to be procedural and governed by federal rules.[323]

Nevertheless, elements substantially foreign to the usual purpose of the joinder inquiry do exist in one important class of federal cases—those in which jurisdiction is based solely on diversity of citizenship. It is a familiar fact that federal district courts may entertain civil suits involving more than $3000 between parties who are "Citizens of different States."[324] Since 1806, the date of *Strawbridge v. Curtiss,*[325] it has been considered settled that the quoted phrase contemplates so-called complete diversity; i.e., no plaintiff may be a citizen of the same state as any of the defendants, irrespective of the number of litigants plaintiff or defendant.[326] Thus, although a case may lie properly in the federal courts so long as *B* of Michigan is plaintiff and *C* of New York is defendant, adding *D* of New York as plaintiff or *E* of Michigan as defendant normally will oust federal jurisdiction. At once it is apparent that, as in *Shields v. Barrow,*[327] a decision that a defendant from the same state as plaintiff (or that a plaintiff from defendant's state) is "indispensable" must effectually end consideration of the case by the federal court, since his joinder would destroy the basis of jurisdiction.[328] Federal rule 19(b) provides that when a person is not indispensable but ought to be a party if complete relief is to be accorded between those already parties—in the terminology of *Shields v. Barrow* a "necessary" party—the court in its discretion may proceed without him where his joinder would deprive the court of jurisdiction of the parties before it.[329] This

323 Ford v. Adkins, (E.D. Ill. 1941) 39 F. Supp. 472. It is doubtful that this separation of the joinder inquiry into two elements is especially meaningful, although as made in 3 OHLINGER, FEDERAL PRACTICE 354-358 (1948), it is approved by Judge Goodrich in Kroese v. General Castings Corp., note 320 supra, at 761-762, n.1. Professor Moore argues for determination according to federal rules [3 MOORE, FEDERAL PRACTICE, 2d ed., §19.07, pp. 2152-2153 (1948)], but his explanation of his position ranges him very nearly alongside Mr. Ohlinger. To the extent that they differ, see the criticism in Judge Goodrich's opinion.

324 28 U.S.C. (1952) §1332(a).

325 3 Cranch (7 U.S.) 267 (1806).

326 Indianapolis v. Chase National Bank, 314 U.S. 63 (1941).

327 17 How. (58 U.S.) 130 (1854).

328 But cf. Washington v. United States, (9th Cir. 1936) 87 F. (2d) 421 at 427.

329 Federal Rules of Civil Procedure 19(b): "When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can

may be regarded as a left-handed limitation on the doctrine of *Strawbridge v. Curtiss.* Though phrased in permissive terms, the very presence of the rule seems to direct the federal courts to accept all diversity cases which legally they can.[330] They will reject cases where there is absent an "indispensable" party, because they must; this, of course, is the rule in all courts, state and federal. The federal courts may accept cases when a "necessary" party is beyond reach of process, because by definition a necessary party is dispensable under such circumstance; this, too, is consonant with state practice. But the federal courts may proceed without a "necessary" party whose joinder, although he is within the state, would destroy diversity or would pose venue problems; there seems nothing exactly like this in state court practice.[331]

Two principal and interrelated questions are presented. First, should the "line" between indispensable and necessary parties be drawn at the same place in federal diversity cases as in the state courts? Second, should rule 19 (b) and its antecedents[332] be supported as providing for the maintenance of federal diversity jurisdiction at, virtually, its maximum?

Although this is not the place for an extended restatement of the familiar controversy over diversity jurisdiction, some position with respect thereto must be taken, because one's notions about the propriety of concurrent jurisdiction in the federal courts bear heavily upon his answers to the two questions just stated. If a party is indispensable and joinder will destroy diversity, the case must be dismissed from federal court; if only necessary, the case may continue under rule 19 (b). A desire to maintain or extend concurrent jurisdiction may well incline a court toward a holding of dispensability, and a desire to restrict that jurisdiction, toward indispensability. As suggested above, rule 19 (b) seems founded

be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

The rule was not an innovation in 1938. Its substance had been embodied in statute and recognized in court long before. See, e.g., 5 Stat. 321 (1839); Barney v. Baltimore, 6 Wall. (73 U.S.) 280 (1867); and see Federal Equity Rule 39, 226 U.S. 659 (1912). Cf. Cameron v. M'Roberts, 3 Wheat. (16 U.S.) 591 (1818).

330 Although this is regarded as the general tenor of rule 19 (b), the court is not *required* to proceed in the excusable absence of a necessary party. The discretion to proceed implies discretion not to proceed. Heyward v. Public Housing Administration, (D.C. Cir. 1954) 214 F. (2d) 222.

331 But see Stevens, "Venue Statutes: Diagnosis and Proposed Cure," 49 MICH. L. REV. 307 at 325-331 (1951).

332 See note 329 supra.

on a policy favoring maximum exercise of federal jurisdiction. Apparently, however, the only federal opinion which expressly acknowledges the liberalizing effect of a desire to retain jurisdiction—and, even then, the acknowledgment is tucked away in a footnote—is that of the Court of Appeals for the District of Columbia in *Brown v. Christman*:[333] "The courts of the United States tend to relax the rules as to the necessity for joinder. . . . This liberality in applying the rules as to necessary joinder is due in large measure to the exigencies of exercising jurisdiction based on diversity of citizenship."

The desirability of diversity jurisdiction has been the subject of prolonged and sometimes heated[334] debate in legal periodicals,[335] with little effect upon the rules.[336] With all respect for the fetish of seeking out the intent of the constitutional fathers,[337] the more fruitful inquiry is into the need and justification for concurrent federal jurisdiction today. From an academic point of view, it is hard to justify concurrent jurisdiction in its present form. Shopping between forums is an unfortunate operation with no necessary relation to the justice of the case.[338] *Erie R.R. v. Tompkins*[339] has reduced that activity as to substantive law, and the trend of state practice rules toward the federal rules is certain to reduce in number the procedural distinctions between the two systems

333 126 F. (2d) 625 at 631-632, n.23 (1942). The cases cited by the court reach "liberal" results, but they do not expressly acknowledge a "tendency to relax" rules of joinder.

334 See Frankfurter, "Distribution of Judicial Power between United States and State Courts," 13 CORN. L.Q. 499 (1928); Yntema and Jaffin, "Preliminary Analysis of Concurrent Jurisdiction," 79 UNIV. PA. L. REV. 869 (1931); Frankfurter, "A Note on Diversity Jurisdiction—In Reply to Professor Yntema," 79 UNIV. PA. L. REV 1097 (1931). The Frankfurter view, expressed with undiminished assurance, appears most recently in Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48 at 53 (1954) (concurring).

335 See, e.g., the list of articles in Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW & CONTEM. PROB. 216 at 235, n.93 (1948). And see Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 A.B.A. REP. 395 at 411-412 (1906).

336 For a list of the principal statutory changes in diversity jurisdiction of the federal trial courts, see Frankfurter, "Distribution of Judicial Power between United States and State Courts," 13 CORN. L.Q. 499 at 511-514 (1928). To this list should be added the federal interpleader acts [39 Stat. 929 (1917); 43 Stat. 976 (1925); 44 Stat. 416 (1926); 49 Stat. 1096 (1936), 28 U.S.C. (1952) §§1335, 1397, 2361] and the statute extending diversity jurisdiction to citizens of the District of Columbia and territories [54 Stat. 143 (1940), 28 U.S.C. (1952) §1332(b)].

337 See Yntema and Jaffin, "Preliminary Analysis of Concurrent Jurisdiction," 79 UNIV. PA. L. REV. 869 (1931).

338 But cf. Horowitz, "Erie R.R. v. Tompkins—A Test to Determine Those Rules of State Law to which Its Doctrine Applies," 23 So. CAL. L. REV. 204 at 219 (1950), suggesting that forum shopping to avoid a restrictive state rule is not evil where the state rule rests on no stronger policy than one of reducing the amount of litigation in the state courts.

339 304 U.S. 64 (1938).

of courts. But these things do not strike at the heart of the problem.

It is usually asserted that the rationale of diversity jurisdiction is the possibility of state court prejudice against a litigant when out of his home state.[340] There is a difference of opinion as to the contemporary reality and importance of prejudice of this kind.[341] Unfortunately, as has been pointed out, there is little objective evidence one way or the other,[342] although the persistence of the view that access to the federal courts is essential to justice for the non-resident is itself some objective evidence that local prejudice exists. If in truth this be the raison d'etre of diversity jurisdiction, then plainly that jurisdiction "is not defined in terms that are responsive to the theory."[343] For example, diversity jurisdiction holds even though neither party is a resident of the state where the action is brought; it is not limited to jury cases; it permits a corporation whose stockholders all are citizens of state *X* and whose operations are entirely in state *X* to litigate a claim against a citizen of that same state in the federal court simply because it happens to be, or is designedly, incorporated in state *Y*.[344] Moreover, there are other prejudices, such as those directed to race and religious faith, probably more damaging than simple distrust of a "foreigner," for which there is no such major remedy as removal to another system of courts.[345] The critics of diversity jurisdiction concede that, in any given case, there may well be very real prejudgments based upon irrelevant factors of this kind, and that some protection is indicated; but if the federal courts are to be

340 "The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts." Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304 at 347 (1816). See also Parker, "The Federal Jurisdiction and Recent Attacks Upon It," 18 A.B.A.J. 433 at 437 (1932).

341 For a statement of both views, see WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS, c.12 (1949).

342 Id. at 259-262; Limiting Jurisdiction of Federal Courts—Comments by Members of Chicago University Law Faculty, 31 MICH. L. REV. 59 at 61 (1932).

343 Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW & CONTEM. PROB. 216 at 236 (1948).

344 Id. at 236-237; Frankfurter, "Distribution of Judicial Power Between United States and State Courts," 13 CORN. L.Q. 499 at 525-527 (1928).

345 Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW & CONTEM. PROB. 216 at 236 (1948).

made available to guard against local prejudice,[346] the diversity rule is a remarkably broad remedy, and in its place should be a provision, after the fashion of the common change-of-venue rules, for removal in those cases where local bias is shown.[347]

Although early abandonment of concurrent jurisdiction is not seriously expected in any quarter, attacks upon some phases of that jurisdiction continue, aimed at eliminating its more vulnerable features. And there have been significant retreats by those heretofore advocating the status quo. For example, the Committee on Jurisdiction and Venue of the Judicial Conference of the United States, in its report dated March 12, 1951,[348] recommended the retention of diversity jurisdiction but recommended also that the Judicial Code be amended to set the jurisdictional minimum at $7500 and to provide that a corporation may not invoke federal jurisdiction in a state in which it is doing business and from which it receives more than half its gross income.[349] Chairman of this committee is Judge John J. Parker, who more than twenty years ago, wrote one of the most vigorous defenses of concurrent jurisdiction.[350] The 1951 report was circulated throughout the federal judiciary, and by the time the Judicial Conference next met, in September, 1951, the latter recommendation had been changed, at the suggestion of the Tenth Circuit, to provide that in cases based on diversity of citizenship a corporation should be deemed a citizen both of the state of its creation and of the state in which it has its principal place of business.[351] The conference approved

346 Apparently there is little demand for federal jurisdiction to protect against other prejudices, reliance being placed rather on state remedies. This should be qualified by noting that in extreme cases an appeal may be made to the Supreme Court on due process grounds.

347 In 1945 a bill was introduced in the Senate which would have restricted diversity jurisdiction to cases removed from a state court by a non-resident defendant "when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court. . . ." S.466 (as amended), 79th Cong., 1st sess. See Hearing before the Senate Judiciary Committee on S.466, 79th Cong., 1st sess. 1 (1945).

In New York Central R.R. v. Johnson, 279 U.S. 310 (1929), a judgment obtained in a federal district court in Missouri and affirmed by the circuit court of appeals was reversed by the Supreme Court because of remarks of trial counsel designed to appeal improperly to sectional and local prejudice. That a state court, especially an elected one, might not be so ready to reverse is argued in Limiting Jurisdiction of Federal Courts—Comment by Members of Chicago University Law Faculty, 31 MICH. L. REV. 59 at 61 (1932).

See also WENDELL, RELATIONS BETWEEN THE FEDERAL AND STATE COURTS 264-268 (1949); McGovney, "A Supreme Court Fiction," 56 HARV. L. REV. 853, 1090, 1225 at 1257 (1943).

348 Mimeographed.

349 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 210 (1951).

350 Parker, "The Federal Jurisdiction and Recent Attacks Upon It," 18 A.B.A.J. 433 (1932).

351 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27 (1951). This is the test specified in the jurisdictional provisions of the Bankruptcy Act. 30 Stat. 545 (1898), 11 U.S.C. (1952) §11 (1946).

the recommendations and authorized the committee to be of any possible service to Congress in its consideration of the legislative changes proposed.[352] In April of 1952, Representative Celler introduced a bill to effect the change with regard to corporations,[353] but it died in committee. Bills to increase the minimum amount in controversy have been numerous in recent sessions, but none has passed.[354] If modifications of this kind are made soon, the criticisms of diversity jurisdiction are likely to become less pointed and more theoretical. Hence, wise or unwise, concurrent jurisdiction probably will be with us for years to come. One cannot escape the facts, however, that the principal justification offered for diversity jurisdiction in its present or proposed form is that it is a weapon against denial of justice through local prejudice, and that it is ill designed for that end. To avoid injustice in particular instances, we have opened the federal courts to a large class of cases, many, perhaps most, of which do not in fact involve any prejudice whatever. One ordinarily does not kill a housefly (or even a hornet) with a ten-pound sledge.

Implicit in the foregoing is the question whether a court—any court—should take into consideration the availability of another forum when deciding indispensability questions. Should the court of state *X* be more ready to dismiss in the absence of an indispensable party if there is a good chance that all persons interested can be brought into court in state *Y*? And what of a federal court which will have to dismiss for incomplete diversity if *A* is joined—should it take into account the possibility of a complete remedy in some state court when deciding whether *A* is indispensable (and so dismiss) or only necessary (and so proceed under rule 19 (b) without him)? The cases do not afford a clear answer to these questions, but common sense indicates an affirmative answer to each.[355] As indicated repeatedly above, a court should consider carefully the harm which may be done to the interest of an absent person, and it should avoid making meaningless and incomplete determinations; but it must seek also to avoid a ruling which serves,

352 REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 27 (1951). See also REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 15 (1952).

353 H.R. 7623, 82d Cong., 2d sess. (1952).

354 See, e.g., H.R. 5007, 84th Cong., 1st sess. (1955); H.R. 4266, 83d Cong., 1st sess. (1953); H.R. 78, 1328, 1988, and 3098, and S. 1593, 82d Cong., 1st sess. (1951); H.R. 3643, 3763, 3868, 4938, 6435, and 9306, 81st Cong., 2d sess. (1950). See also Yntema and Jaffin, "Preliminary Analysis of Concurrent Jurisdiction," 79 UNIV. PA. L. REV. 869 at 873, n.7 (1931).

355 Cf. Aetna Ins. Co. v. Busby, (N.D. Ala. 1950) 87 F. Supp. 505; Martin v. Chandler, (S.D. N.Y. 1949) 85 F. Supp. 131; Latrobe Elec. Steel Co. v. Vascoloy-Ramet Corp., (D.C. Del. 1944) 55 F. Supp 347.

in effect, to deprive a plaintiff of all opportunity for a judicial determination of the merits of his claim. If plaintiff clearly has a remedy elsewhere should he seek to pursue it, it is not especially serious if he be sent out of this court for non-joinder of *A;* and it should not require much of an adverse effect on *A* to cause the court, on motion of a party or sua sponte, to move to protect *A* by ordering him joined on pain of dismissal of the action. But if the plaintiff likely cannot maintain his action elsewhere—due to limitations on the jurisdictional reach of the various courts—then the court ought to consider every means available to retain his case for adjudication,[356] including a careful weighing of the likelihood of factual injury to *A*'s interest and its relative value, and a consideration of the possibility of shaping a decree to grant plaintiff as much merited relief as possible while safeguarding *A*'s interest.[357] This procedure surely may be employed by state courts; nothing in the concept of state autonomy prevents one court from noting the availability of a forum in a sister state (or a federal forum). One unsympathetic with concurrent jurisdiction may argue that a federal court not only may, but indeed *should* look to the jurisdictional availability of a state court. To a substantial extent rule 19 (b) countermands this procedure, but not entirely. First, as noted,[358] the rule permits a court to refuse to proceed even where *A* is only necessary, and this refusal may be based on the feeling that the case would be better disposed of in one package in a state court. Second, the indispensable necessary line still is a vague shadow zone, and the conclusion that a unitary determination in a state tribunal is preferable may well lead to a holding of indispensability and a refusal to proceed, even though in absence of an alternative state jurisdiction the same federal court might strain to hold *A* only necessary and so proceed without him.

The more serious problem is presented by the case where all facts seem to indicate that *A*'s interest will be adversely affected

356 Certainly it does not help for the court merely to express sympathy for his predicament, as in Baker v. Dale, (W.D. Mo. 1954) 123 F. Supp. 364 at 370.

357 An excellent example of this process in practice is Kroese v. General Steel Castings Corp., (3d Cir. 1950) 179 F. (2d) 760 at 764-766, cert. den. 339 U.S. 983 (1950), discussed in section III-A supra, at notes 82ff. And see Latrobe Elec. Steel Co. v. Vascoloy-Ramet Corp., (D.C. Del. 1944) 55 F. Supp. 347, where the federal court in Delaware stayed the principal proceedings to give plaintiff time to bring action in the federal court in Illinois, where jurisdiction over this defendant and the absent corporation could be obtained. If plaintiff should fail to institute suit in Illinois, then this court would re-examine the motion for dismissal for want of an indispensable party, but would not determine that question now.

358 See note 330 supra.

if the court is to make a meaningful determination at all, and yet there appears to be no state court where jurisdiction over all persons can be obtained. Joinder of *A* in the federal court is impossible because the court's process stops at the state line[359] or, at best under a recent suggestion, 100 miles from the courthouse,[360] or because the statutory venue requirement cannot be met,[361] or because the joinder would destroy jurisdiction by creating incomplete diversity. At present, if the court can formulate no decree which will protect *A*'s interests, plaintiff's claim is at dead end and will remain there unless a timely change in location of his adversaries or co-parties occurs. His predicament is the same as Robert Barrow's.[362] This is the point at which diversity jurisdiction could be of great assistance to litigants. Here it is that the federal courts could furnish a desirable, unduplicated forum in diversity cases. Yet, now, where the state court is impotent, so is the federal; and *Strawbridge v. Curtiss* makes the area of federal impotence even wider. At the precise point where most needed, federal diversity jurisdiction is currently of no value.[363]

The problems of process and venue are amenable to legislative solution.[364] It would not be novel to permit federal court process to run across state lines; indeed that very thing now happens in some cases not based on diversity, as, for example, in cases under the Federal Interpleader Act[365] and in suits to obtain patents or relief against patent interference.[366] And recently proposed was an amendment to the federal rules to permit out-of-state

359 Federal Rules of Civil Procedure 4(f).

360 Proposed (but rejected) amendments to rule 4(f) would have permitted service without the state if within 100 miles of the courthouse, as is the case with subpoenas under present rule 45. Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States (1954).

361 28 U.S.C. (1952) §1391(a): "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." The most significant exception referred to is 28 U.S.C. (1952) §1655, the first paragraph of which permits venue in actions to enforce liens on or claims to property or to remove clouds on title to be laid in the district where the property is. See Blume, "Actions Quasi in Rem under Section 1655, Title 28, U.S.C.," 50 MICH. L. REV. 1 (1951).

362 He of Shields v. Barrow, section III-A supra.

363 See Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code," 13 LAW & CONTEM. PROB. 216 at 234 et seq. (1948); Barrett, "Venue and Service of Process in the Federal Courts—Suggestions For Reform," 7 VAND. L. REV. 608 at 634 (1954).

364 See Barrett, note 363 supra, at 627 et seq.

365 49 Stat. 1096 (1936), as amended, 63 Stat. 105 (1949), 28 U.S.C. (1952) §2361.

366 44 Stat. 1394 (1927), 35 U.S.C. (1952) §72(a). Additional examples are listed in Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1 at 23, n.92 (1945).

service within 100 miles of the courthouse.[367] Venue provisions, being incapable of enlarging the jurisdiction of the court system, could be altered in any suitable fashion within the jurisdictional framework, subject only to the obvious requirement that the place of trial have some reasonable connection with the parties or the event.[368] No decisions appear to cast any doubt on the propriety of permitting venue to be laid in any district where *any* of the parties resides, especially when the court is empowered to transfer the cause to a more convenient forum, as under present section 1404 (a) of the Judicial Code.[369]

There is, however, some doubt whether legislative abrogation of the complete diversity rule of *Strawbridge v. Curtiss* would be constitutional. Section 2 of Article III of the United States Constitution provides that "The judicial power shall extend . . . to controversies . . . between citizens of different States. . . ." The present provision in the Judicial Code which confers diversity jurisdiction requires that the action be between "Citizens of different States."[370] Language not materially different was said in *Strawbridge* to mean "that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts."[371] All subsequent Supreme Court pronouncements seem to affirm the *Strawbridge* requirement: each plaintiff must be qualified by diversity to sue each defendant in a federal court.[372] Several of the cases have suggested that an interpretation of the statute to permit incomplete diversity would be beyond the constitutional authorization. For example, Justice Curtis, in our much-cited case of *Shields v. Barrow,* said of an order which would sanction the addition of parties

367 See note 360 supra. Thus, process might have run across even two state boundaries, as, e.g., from New York City to Philadelphia.

368 See Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1 at 22 (1945), citing Davis v. Farmers Co-operative Equity Co., 262 U.S. 312 (1923) (Minnesota trial of imported cause of action between non-residents held precluded by commerce clause).

369 62 Stat. 937 (1948).

370 28 U.S.C. (1952) §1332 (a) (1).

371 3 Cranch (7 U.S.) 267 (1806).

372 Shields v. Barrow, 17 How. (58 U.S.) 130 at 145 (1855); Coal Co. v. Blatchford, 11 Wall. (78 U.S.) 172 (1871); Case of the Sewing Machine Companies, 18 Wall. (85 U.S.) 553 (1874); Removal Cases, 100 U.S. 457 (1879); Blake v. McKim, 103 U.S. 336 (1881); Hyde v. Ruble, 104 U.S. 407 (1882); Peninsular Iron Co. v. Stone, 121 U.S. 631 (1887); Smith v. Lyon, 133 U.S. 315 (1890); Indianapolis v. Chase National Bank, 314 U.S. 63 (1941).

who would render diversity incomplete, "It is apparent that, if it were in the power of a circuit court of the United States to make and enforce orders like this, both the article of the constitution respecting the judicial power, and the act of congress conferring jurisdiction on the circuit courts, would be practically disregarded in a most important particular. . . . No such power exists. . . ."[373] It has been argued that in no case has the constitutional issue been decided squarely, it being possible to place each holding on other grounds;[374] but the close similarity between the constitutional language and the statutory language and the hostile indications in the cases lend considerable weight to the argument that the *Strawbridge* interpretation of the statute is the Court's interpretation of the Constitution as well.

If it is true that *Strawbridge* is indicative of a constitutional principle, there are nevertheless several devices curiously available for circumventing it. For example, a class suit properly may be lodged in a federal court if the representatives have the requisite diversity from their antagonist even though some or all of the other members of the class are citizens of the antagonist's own state.[375] The Delaware corporation whose stockholders, office and entire business are in Arizona may nevertheless make use of the federal courts in its litigation with Arizona residents.[376] As noted already, federal rule 19 (b) runs counter to the spirit if not the letter of *Strawbridge*. Also available is the device of intervention: if the intervenor's claim is deemed ancillary to the principal litigation, intervention need not be supported by independent jurisdictional grounds.[377] When this principle is coupled with

373 17 How. (58 U.S.) 130 at 144 (1855). See also Blake v. McKim, 103 U.S. 336 (1881).

374 McGovney, "A Supreme Court Fiction," 56 HARV. L. REV. 853, 1090 at 1105 (1943). See Treinies v. Sunshine Mining Co., 308 U.S. 66 at 71 (1939). And it is argued that federal interpleader provisions for a kind of incomplete diversity are indication that the prohibition is not constitutional. Keeffe, "Twenty-Nine Distinct Damnations of the Federal Practice," 7 VAND. L. REV. 636 at 654-655 (1954).

375 Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Shipley v. Pittsburgh & L.E.R.R., (W.D. Pa. 1947) 70 F. Supp. 870. See Stewart v. Dunham, 115 U.S. 61 at 64 (1885).

376 See Frankfurter, "Distribution of Judicial Powers between United States and State Courts," 13 CORN. L.Q. 499 at 523 (1928); 1 CYC. OF FED. PROC., 2d ed., §200 (1943). See, generally, McGovney, "A Supreme Court Fiction," 56 HARV. L. REV. 853, 1090, 1225 (1943). The most recent important attack on the effect of the corporate citizenship fiction on federal jurisdiction is the recommendation of the Judicial Conference of the United States, note 352 supra, embodied in Representative Celler's bill, note 353 supra, that a corporation be deemed a citizen both of the state of its creation and of the state in which it has its principal place of business. On the effect of multiple incorporation see Seavey v. Boston & Maine R.R., (1st Cir. 1952) 197 F. (2d) 485; Frankfurter, supra this note.

377 Humble Oil & Ref. Co. v. Sun Oil Co., (5th Cir. 1951) 190 F. (2d) 191; Kentucky Nat. Gas Corp. v. Duggins, (6th Cir. 1948) 165 F. (2d) 1011; Johnson v. Riverland Levee

rule 19(b) in an appropriate case, the complete diversity rule comes a cropper, as strikingly illustrated by *Drumright v. Texas Sugarland Company*.[378] The Sugarland Company, a Kansas corporation, mortgaged land to Grand Lodge, an Oklahoma corporation. Later, Sugarland sold the land to Drumright and others for cash plus a promise to pay off the mortgage. The buyers apparently were Texans, with the exception of one Oklahoman. The buyers defaulted in their payments on the mortgage, and Sugarland and Grand Lodge sued in a federal district court in Texas for foreclosure, to have an equitable lien declared and enforced, or for rescission, alternatively. Because federal jurisdiction was based on diversity of citizenship the Oklahoma purchaser moved to dismiss the case for incomplete diversity. The court dismissed not the case but only Grand Lodge as a plaintiff, holding that it was not an indispensable party.[379] Thereupon, Grand Lodge filed a petition to intervene in the cause; intervention was allowed. "The Grand Lodge, as the holder of a mortgage on the land against which an equitable lien in favor of the Sugarland Company was asserted by the suit, had such an interest in that land as to make permissible the assertion by intervention of the Grand Lodge's rights under its mortgage."[380] No jurisdictional problem was deemed to exist. Thus, by the simple device of dismissal (or withdrawal[381]) of a party and subsequent intervention, one may avoid the *Strawbridge* rule. There is much uncertainty as to when an intervention must stand on its own jurisdictional feet and when it may rely on the jurisdictional facts of the main case,[382] but in any

Dist., (8th Cir. 1941) 117 F. (2d) 711; Glover v. McFaddin, (E.D. Tex. 1951) 99 F. Supp. 385. See American Bowling Supply Co. v. Al Martin, Inc., (D.C. Kan. 1951) 96 F. Supp. 35 at 37; American Union Ins. Co. v. Lowman Wine & Bottling Co., (W.D. Mo. 1950) 94 F. Supp. 774 at 776.

378 (5th Cir. 1927) 16 F. (2d) 657.

379 "So far as the bill was one for the enforcement of the equitable rights of the Sugarland Company as the seller of said land, the holder of a mortgage on that land, which was in existence at the time of the sale, was not an indispensable party, as the seller's rights against the buyer could be adjudged and enforced without directly affecting the preexisting mortgage on the land or the holder of that mortgage. Sioux City Terminal R. & W. Co. v. Trust Co. (C.C.A.) 82 F. 124." Id. at 658. Assuming that Grand Lodge was merely "necessary," this is precisely the result which would obtain under present rule 19(b).

380 16 F. (2d) 657 at 658.

381 By dictum, the court in Kentucky Nat. Gas Corp. v. Duggins, (6th Cir. 1948) 165 F. (2d) 1011, states clearly that employment of the intervention device to escape jurisdictional limitations, even as a deliberately chosen alternative to outright joinder, does not defeat jurisdiction.

382 "As stated in all the textbooks, there is considerable confusion, if not conflict, in the authorities." Sun Oil Co. v. Humble Oil & Ref. Co., (S.D. Tex. 1950) 88 F. Supp. 658 at 663, revd., obviously on other grounds, sub nom. Humble Oil & Ref. Co. v. Sun Oil Co., (5th Cir. 1951) 190 F. (2d) 191. However, Professor Moore believes the cases can be

case of the latter class the *Strawbridge* policy can be circumvented by the *Sugarland* expedient.[383]

In the matter of the timing of the compulsory joinder

marshaled to support the following rules: "[1] Intervention under an absolute right, or [2] under a discretionary right in an *in rem* proceeding, need not be supported by the grounds of jurisdiction independent of those supporting the original action. [3] Intervention in an *in personam* action under a discretionary right must be supported by independent grounds of jurisdiction, except when the action is a class action." 4 MOORE, FEDERAL PRACTICE 139 (1950).

The third statement seems supportable. So-called discretionary intervention in an in personam action ordinarily is tied to the principal litigation only by a common question of law or fact. Federal rule 24(b)(2). It represents an independent suit, and must possess its own jurisdictional facts. Lacking diversity, intervention will be denied. Johnson v. Riverland Levee Dist., (8th Cir. 1941) 117 F. (2d) 711; Baltimore & O. R.R. v. Thompson, (E.D. Mo. 1948) 8 F.R.D. 96. Wichita R.R. v. Public Utilities Comm., 260 U.S. 48 (1922), sometimes cited as contrary, was not strictly an in personam action. See Baltimore & O. R.R. v. Thompson, supra this note, at 99.

Moore's second rule, that intervention under a discretionary right in an in rem proceeding need not be supported by independent jurisdictional grounds, also finds some basis in the cases, on the ground that the intervention is ancillary to the main case. Drumright v. Texas Sugarland Co., (5th Cir. 1927) 16 F. (2d) 657; Golconda Petroleum Corp. v. Petrol Corp., (S.D. Cal. 1942) 46 F. Supp. 23; cases cited in note 377 supra.

But real difficulty is encountered in the first class of cases mentioned, those where intervention is "under an absolute right." This is due chiefly, one suspects, to the clear error, embalmed in the federal rules, in assuming that—save the rare intervention of right under a federal statute—there is any such thing as an absolute right to intervene. Rule 24(a) purports to make intervention available of right "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." But the trial court still must determine whether representation of the applicant's interest is inadequate and whether he may be bound by the judgment; this is a discretionary determination, involving findings both of fact and of law. Neither does the rule rob the court of discretion in deciding whether the applicant is so situated as to be adversely affected by a distribution of property in the court's custody or control. Intervention in these cases is not and cannot be of right until the preliminary determination is made. This preliminary determination is substantial and is so serious a limitation on the "right" as to make the use of the term misleading. It is true that in cases under rule 24(a) the court apparently is not authorized to take into account the possible delay or prejudice to the principal action, whereas under rule 24(b) it is directed to do so. Except for this omission, subdivisions (2) and (3) of rule 24(a) employ language closely similar to that used when a court is determining the indispensability of a party. If in a given case the tests be substantially the same, i.e., for permitting intervention and for finding indispensability, one is disturbed by the frequent statement that where the intervenor is an indispensable party his improper citizenship will destroy the court's jurisdiction—a rule partially at variance with Moore's attempted summary. Kentucky Nat. Gas Corp. v. Duggins, (6th Cir. 1948) 165 F. (2d) 1011; Charleston Nat. Bank v. Oberreich, (E.D. Ky. 1940) 34 F. Supp. 329. *Compare* Wichita R.R. v. Public Utilities Comm., 260 U.S. 48, 54 (1922) ["Much less is such (diversity) jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties."] *with* Humble Oil & Ref. Co. v. Sun Oil Co., (5th Cir. 1951) 190 F. (2d) 191 at 197 ["To allow the State of Texas to intervene here would introduce a new litigant, which is not an indispensable party and whose presence would destroy the jurisdiction of the court. . . ."].

[383] The Fifth Circuit reaffirmed Sugarland in McComb v. McCormack, 159 F. (2d) 219 at 224-225 (1947).

inquiry, also, it is revealing to compare federal diversity cases with state (and federal non-diversity) cases. Nicely illustrative of the manner in which a federal diversity case may offer problems not necessarily presented in non-diversity cases is *Calcote v. Texas Pacific Coal & Oil Company*.[384] On June 1, 1939, Calcote and others as lessors entered into a lease with Texas Pacific, giving it the right to explore for oil, gas, and other minerals. The term of the lease was ten years, with annual delay rentals of $60. The lessors and the leased land were in Mississippi. The lessee was not qualified to do business in Mississippi as of the date of the lease; a Texas corporation, it became domesticated in Mississippi on January 2, 1940. Thereafter, the lessors conveyed mineral interests in the land, subject to the lease, to several grantees, at least one of whom was in Texas, one in New York, and several in Mississippi. These grantees were given no right to bonuses or delay rentals; their participation in future leases was limited to a proportionate amount of royalty payments under any such future lease, even as under the existing agreement. In May of each year through 1944, delay rentals were accepted by the lessors.

An action in a federal district court in Mississippi was then instituted by the lessors to cancel the lease on the ground that it was void when executed because of the lessee's non-qualification to do business in Mississippi. The lessee answered that the lease was voidable merely and had been ratified by the lessors' acceptance of delay rentals and by conveyances of the greater part of their royalty interests after the lessee had qualified to do business in Mississippi. The lessee filed a counterclaim, asking that its rights under the lease be confirmed.

The district court gave judgment for defendant-lessee both on the original bill and on defendant's counterclaim, and plaintiffs appealed to the Court of Appeals for the Fifth Circuit. At no time—in the district court or in the circuit court—did either party object to the nonjoinder of the lessors' grantees. Nevertheless, the majority in the circuit court felt the absence of the grantees to be a complete barrier to maintenance of the action, and the case was reversed and remanded to the district court with direction to add parties. In view of the fact that joinder of the grantees would destroy diversity, the court's action was tantamount to an order of dismissal.

The circuit court said that "In diversity cases, the question of

384 (5th Cir. 1946) 157 F. (2d) 216, cert. den. 329 U.S. 782 (1946).

indispensable parties is inherent in the issue of federal jurisdiction, the determination of which should never await a decision on the merits if the complaint states a cause of action."[385] Stating also that the "true test is the situation that existed before and not after entry of the final judgment"[386] and that this "decisive" jurisdictional issue is "on the threshold"[387] of the appeal, the court thus indicated clearly that where its jurisdiction depends upon the establishment of diversity of citizenship of the parties, it will inquire into the question of compulsory joinder of absent parties at the outset if the problem is recognized. It is plain also that the inquiry will be made by the court on its motion, if necessary, and at whatever stage in the action the problem first calls itself to the court's attention.

It cannot be denied that there is much that is sound in the court's view that in the presence of a "jurisdictional question" (a more nearly appropriate use of that phrase here than is usual in joinder cases[388]) the inquiry into the necessity of joinder cannot be put aside to abide the outcome of the litigation—to stand if the decision does not affect the interests of absent parties adversely, to fall if it does. Any other view would involve the court as often as not in the wasteful process of presiding over a lengthy course of litigation proving ultimately to have been void ab initio. "A precarious jurisdiction that limits the scope of judicial decision on the merits cannot be entertained."[389] So long as the federal courts are empowered to adjudge some controversies solely because the parties are from different states, the necessity of joining another person whose presence will destroy diversity is a question which ought to be determined at the earliest possible moment.

But when the argument in the preceding paragraph has been made, what has been added to the general principles applicable to all these joinder cases? Can it not be said that in all actions, diversity cases merely included, the determination of whether the absent person will be affected adversely cannot logically be put off to abide the event of the action? If the action may so prejudice the absent *A* as to be "wholly inconsistent with equity and good conscience"[390] (a question of fact), then *A*'s joinder should be re-

385 157 F. (2d) 216 at 218.
386 Ibid.
387 Ibid.
388 See text in section II-A supra, at notes 15-17.
389 Calcote v. Texas Pacific Coal & Oil Co., (5th Cir. 1946) 157 F. (2d) 216 at 218, cert. den. 329 U.S. 782 (1946).
390 Curtis, J., in Shields v. Barrow, 17 How. (58 U.S.) 130 at 139 (1854).

quired—whether the court be state or federal has no bearing. If in the diversity case a decision to require joinder effectually terminates the action by leading to a destruction of diversity and thus of jurisdiction, so also in non-diversity cases a requirement of joinder may as effectually bring an end to the case if the absent person is not within the court's reach. The process and effect are not fundamentally different in the two circumstances. Destruction of diversity is not part and parcel of the party issue, which is practically the same in state and federal cases. Ouster of jurisdiction is merely a consequence of a particular holding, already arrived at, on the party issue.

This should be qualified by saying that the possible mortality inherent in the court's determination of the party question may be taken into account in deciding that very question. This is federal rule 19 (b)[391] again, but it represents the desirable state procedure as well. The court should ask of those present: Why do you want to handle this without the grantees when they won't be bound (of course) and could relitigate? Whether or not the court should continue will depend largely on the answer to that question. If the answer suggests the probability of a multiplicity of suits, then joinder presumably should be required. Here, there seems little likelihood of litigation by the *Calcote* grantees. But the court's reasoning moves in the other direction. The not unreasonable assumption that the grantees and the lessors had similar interests might indicate that cancellation, sought by the lessors, would be to the grantees' benefit as well[392] (perhaps, for example, because of the availability of a more lucrative lease were they free to enter into it). Yet the court stated that a cancellation of the lease would adversely affect the grantees since it would annul their "vested rights."[393] If it be thought to follow therefrom that confirmation of those vested rights, as prayed in defendant's counterclaim, would not adversely affect the interests of the grantees, the court has an answer for that too, stating that "The cancellation of the present lease would destroy their vested interest

391 See text at notes 329 et seq. supra.

392 "Doubtless all will admit that the [lessors] have only an undivided one-fourth of one-eighth royalty in the minerals so long as the present lease is in force and effect. It is a fractional mineral interest in the whole tract distinct from their contingent reversionary interest. It would not be possible to cancel this lease without destroying the undivided three-fourths royalty interest therein owned by the above named individuals who have not been made parties to this suit. [But query.] . . . The lessors and their grantees were, technically and beneficially, joint owners of a common property, each with an undivided interest in every particle of the minerals." 157 F. (2d) 216 at 219.

393 Id. at 219.

in praesenti, whereas a declaration of its validity would either destroy absolutely their vested interest in futuro or postpone the enjoyment of it indefinitely. Vested interests of absent parties, therefore, will be directly and vitally affected regardless of the outcome of this litigation."[394] That an adverse or injurious[395] effect is inevitable may be doubted. Quite possibly the trouble is that the court lacked the facts which would be elicited by the inquiry as to why plaintiffs and defendant both were willing to proceed in the grantees' absence. The lack of those facts may have required that the case be remanded. But the court did not say so. The absence of any objection by the parties themselves to nonjoinder should not be dispositive of the issue. Failure to object may be collusive or ignorant, or the result of a simple mistake. At best, the failure may be an indication that the parties are satisfied to proceed as they are because they anticipate no subsequent suit by the absent ones. However, the court can do better than draw inferences from the parties' silence; it can and should ask them why they choose to proceed thus.

The *Calcote* decision seems additionally unfortunate in that it was on the appellate level. The kind of inquiry just suggested is designed for the trial court's use; once the case passes that tribunal and arrives in an appellate court, there ought to be the most compelling of reasons before dismissing (in effect) and on the court's own motion.[396] If a case has been tried and is on appeal with a result which is supportable in law and which does not adversely affect the interests of the absent party[397] whose nonjoinder is being urged as a ground for reversal, more, rather than less, vain judicial work is required. It would be unfair, however, not to point out the pertinent consideration of discipline, i.e., that if the case were not remanded, trial courts might go right on entertaining jurisdiction in cases where that jurisdiction may prove baseless ultimately. *Calcote* is a warning to judges and lawyers alike, at a client's expense.

394 Id. at 221. "It would be hard to find a better illustration of indispensable parties than is afforded by the instant case." Id. at 220.

395 Both the majority and minority opinions use the phrase "injuriously affect"; only the minority uses "adversely affect."

396 This is not to suggest that a court should be limited to those joinder issues raised by the parties; but it does suggest that if it is not clear that an absent person will be harmed there should be reluctance to dismiss after completion of the entire trial process.

397 Concededly, this fact is not clear in the Calcote case. The court concluded that such interests would be "vitally" affected, which in context obviously meant adversely. Elsewhere the court used "injuriously." The opinion is lacking in facts to support the conclusion.

Judge Hutcheson's dissent[398] is refreshing in its implicit acknowledgment that so-called indispensable parties are not inevitably indispensable in the dictionary sense of that word.

> "The truth of the matter is that the classification of parties as necessary or indispensable depends entirely upon the particular facts of each case. . . . Further, though some of the decisions exhibit more than a little confusion about it, it is undeniable that the error in non-joinder of parties, either necessary or indispensable, is not jurisdictional. . . . Finally, it is clearly settled that even if a party is indispensable,[399] his absence from a suit will not be ground for dismissing it or reversing a judgment in it, if it clearly appears that no relief can be, or has been, obtained in the suit which injuriously affects his interest."[400]

As suggested earlier, the majority in the *Calcote* case seems to be concerned primarily with what it calls a "precarious jurisdiction," not wanting the court to spend time dealing with litigation which may prove to have been entertained erroneously. And yet the Supreme Court, in *Bourdieu v. Pacific Oil Company,* [401] held that an inquiry into the indispensability of a party would be a waste of time where the bill failed to state a cause of action.[402] If the question of indispensability is indeed liminal, a court would be without jurisdiction even to determine the issue of whether a cause of action is stated. Yet this would be unnecessarily strict. The *Calcote* majority opinion agrees, but it seeks to distinguish the *Bourdieu* rule by stating that an examination into indispensability in the *Bourdieu* circumstances would be a gratuitous inquiry, and improper under the rule that a court will not concern itself with vain things. Instead, it is deemed perfectly proper to

398 157 F. (2d) 216 at 223.

399 Judge Hutcheson's failure to place "indispensable" in quotation marks as used in this sentence reminds of the familiar dialogue in chapter six of "Through the Looking Glass" which follows Humpty Dumpty's assertion that he used "glory" to mean "nice knock-down argument."

"'But "glory" doesn't mean "a nice knock-down argument,"' Alice objected.

"'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

"'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

"'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"

400 157 F. (2d) 216 at 223.

401 299 U.S. 65 (1936).

402 Cf. West Coast Exploration Co. v. McKay, (D.C. Cir. 1954) 213 F. (2d) 582 at 592-593, cert. den. 347 U.S. 989 (1954).

dismiss, upon having entertained the case for that purpose; and no distinction is drawn between those cases in which joinder of the absent person would have ousted federal jurisdiction and those in which it would not. In a case where it is obvious that no cause of action is stated, there is no difficulty in dismissing quickly, and the absent person, no matter how plainly his interests would be affected by the outcome of the suit were it to go to judgment on the merits, can have no objection since his interests are not affected at all by abortive litigation. It is not always readily apparent, however, whether a bill states a cause of action. Occasionally a case will go all the way to a court of last resort on the issue of whether the facts offered by plaintiff provide, in point of law, grounds for the relief sought. But there is in the *Bourdieu* rule, which is recognized and distinguished by the *Calcote* majority and relied upon by the minority, nothing to draw any line between the case of the obviously bad bill and the one which is only arguably bad. That argument may take the case through several courts and may be resolved ultimately in favor of the plaintiff, with the results that the joinder issue thereupon must be faced. Conceivably, more effort will have been expended in vain than if the party joinder question had been disposed of first.

However, a distinction suggests itself, a distinction which may justify a difference in results. If the question is whether the result to be reached on a presumably good cause of action will or will not affect the absent person adversely, the possibility of the prejudicial result is rather definite and foreseeable. If, however, the question is one of the validity of a cause of action and the initial ruling, in the trial court, is one of dismissal, that issue and that alone will be appealed. Affirmance on appeal renders the joinder question moot, whereas reversal will normally be followed by an opportunity to plead over (if, indeed, that was not given and availed of in the trial court). Upon the statement of a cause of action which the trial judge feels can be sustained, the joinder issue can then be considered.

The view that failure to join an interested person is nonprejudicial if the relief given did not harm him came under heavy attack by the Fifth Circuit in *Young v. Powell.*[403] The relief asked for, not that granted, in the trial court was held to determine indispensability. In this view, the *possibility* of a decree which

[403] 179 F. (2d) 147 (1950), cert. den. 339 U.S. 948 (1950).

would have an adverse effect upon an absent person would override the fact that the relief actually given benefited instead of harmed him. In effect, a person is indispensable if his interests will be affected, whether favorably or injuriously makes no difference. To the argument that the relief given inured to the benefit of absent persons and thus excused nonjoinder, the court responded that to permit such a distinction to prevail would make of the indispensable party rule a "delusion and a snare," and that the

> "whole doctrine and the equitable basis on which it rests would be gone by the board.
>
> "Such view would permit the continual harassment of the defendant by successive suits brought singly by interested parties, each in the interest of them all, for cancellation with no protection, in case the defendant wins, from successive suits by the others who had not been made parties, while in case he lost in the first suit, his complaint that he ought not to have suffered a judgment in favor of persons who were not sued,[404] would be met by the cynical view, 'Well, those who ought to have been in the suit haven't suffered because their interests have prevailed, and having lost the suit, it doesn't lie in your mouth to complain that they got the benefit of a suit to which they were not made parties.' "[405]

Does the common sense of this statement cut the ground from beneath criticism of the *Calcote* decision? If so, it is odd to find Judge Hutcheson writing the dissent in *Calcote* and the opinion of a unanimous court in *Young*. Hutcheson himself suggests, but does not spell out, the distinction.

> "The doctrine of indispensable parties as set down in Mallow v. Hinde, 12 Wheat. at page 198, 6 L. Ed. 599, is equitable in origin and result, set down carefully and as carefully maintained, there has never been any basis for the view that where the want of indispensable parties has been *timely* called to the attention of the trial judge, and he has denied a motion to dismiss, such want can be regarded as cured by the fact relied on here, that a judgment has been granted in plaintiff's suit in favor of the absent parties."[406]

404 The court apparently alludes to persons whose interests align them with plaintiff, although if they failed to come in voluntarily and were brought in by plaintiff to make possible a full adjudication they nominally would be defendants.

405 179 F. (2d) 147 at 152.

406 Ibid. Emphasis supplied.

In *Young,* defendant made timely objection in the trial court and at every appropriate point in the course of the litigation; in *Calcote,* no objection came from the parties themselves at any stage, including the hearing before the circuit court. This bears upon the opportunity which plaintiff had in the trial court to justify the nonjoinder. In *Calcote,* the matter is new and to reverse without an affirmative showing of injury to those absent is to express a concern beyond the dictates of necessity. If it can be shown that the absent persons have been unharmed in fact, or even benefited, it seems foolish to remand or dismiss the case. In *Young,* however, defendant has been objecting every step of the way, with ample opportunity to plaintiff to show the propriety of nonjoinder. When an appellate court believes plaintiff has failed, a reversal may be appropriate even though the evolution of the case has left unharmed those not joined.

E. *In Short*

The essence of all that precedes is that questions of required joinder should be resolved less and less on the basis of pat formulations which provide generalized characterizations of parties, and more and more on case by case consideration of the interrelated and sometimes competing interests in reducing litigation, minimizing harassment of defendants, protecting absent persons, providing a forum for bona fide claims, and the like. If it be deduced from any portion of the cases discussed that criticism of mechanical solutions based on (unrealistic) labels is an attack on a straw man, and that in fact the courts now actually decide these questions rationally, then it is not too much to ask that the obfuscating use of the labels be abandoned and that opinions indicate that facts have been sought and examined which bear on the various interests presented.

If one accepts Dean Pound's theory that our legal system in development alternates between strict rule and formula on one hand and informality and judicial discretion on the other, and that contemporary jurisprudence is in one of the liberal, more flexible eras, our thesis is, at very least, riding the pendulum; and one gains if only from realizing that labels no longer determine outcomes. It may not be fruitless to catalog cases to show, e.g., that courts often call junior mortgagees necessary or indispensable in foreclosure suits, or that joint obligees are required to sue together; most cases fit into the general pattern. But no lawyer

worth his calling can afford to forget for one moment that such lists give rise to little more than a presumption. There is no person so intimately related to matter in litigation between others that there cannot be circumstances which will justify proceeding in his absence. The descriptive term assigned to him is irrelevant to the process of decision.